78-236

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

METROPOLITAN DEVELOPMENT AND HOUSING AGENCY,
Plaintiff-Appellant,

v.

SOUTH CENTRAL BELL TELEPHONE COMPANY; METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, acting by and through the ELECTRIC POWER BOARD of said Government; NASHVILLE GAS COMPANY; COLONIAL PIPELINE COMPANY; and THE WESTERN UNION TELEGRAPH COMPANY,
Defendants-Appellees.

On Appeal from the Supreme Court of the State of Tennessee
at Nashville
Davidson Equity

JURISDICTIONAL STATEMENT

On Behalf of Plaintiff-Appellant

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METROPOLITAN DEVELOPMENT AND HOUSING AGENCY,
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v.

SOUTH CENTRAL BELL TELEPHONE COMPANY; METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, acting by and through the ELECTRIC POWER BOARD of said Government; NASHVILLE GAS COMPANY; COLONIAL PIPELINE COMPANY; and THE WESTERN UNION TELEGRAPH COMPANY,
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On Behalf of Plaintiff-Appellant

Comes the appellant, the Metropolitan Development and Housing Agency (hereinafter referred to as plaintiff), and would show unto the Court as follows:

OPINIONS BELOW

In October of 1973, a suit was filed in the Chancery Court of Davidson County, Tennessee, alleging that a statute passed by the Legislature of the State of Tennessee was violative of the

Contract Clause of the Constitution of the State of Tennessee and of the Contract Clause of the Constitution of the United States. The Chancery Court on December 1, 1976, entered a judgment contrary to the plaintiff's position, from which an appeal was taken to the Court of Appeals of the State of Tennessee. On October 28, 1977, the Court of Appeals affirmed the Chancery Court, and certiorari was denied by the Supreme Court of the State of Tennessee on March 13, 1978. The Court of Appeals' Opinion and the denial of certiorari by the Tennessee Supreme Court are set out in full in the Appendix hereto.

JURISDICTION

On the 6th day of June, 1978, notice of appeal to this Honorable Court was filed pursuant to 28 U.S.C. §1257(2), as a result of the final decision of the state court having sustained the validity of a state statute that has been challenged on federal constitutional grounds. *Huffman v. Pursue Ltd.*, 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed. 2d 463 (1975).

The federal constitutional grounds raised are that T.C.A. §§13-828 through 13-831 violate the Contract Clause of the United States Constitution, Article 1, Section 10, in that said statute impairs certain existing contractual obligations. Article 1, Section 10, provides as follows:

> "[1.] No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make any thing but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility."

T.C.A. §13-830 provides as follows:

> "13-830. **Reimbursement of cost of moving utility facilities.**—Whenever a municipality, housing authority, or other public body of this state determines that the relocation of public service facilities of a utility within a redevelopment or urban renewal project area is necessary to the carrying out of a redevelopment or urban renewal plan pursuant to the provisions of the housing authority law, the municipality, housing authority, or other public body shall reimburse the utility for the cost of relocation of such facilities. [Acts 1971, ch. 191 §3.]"

QUESTIONS PRESENTED FOR REVIEW

I. **Whether a Local Governmental Agency, Who Is a Party in Interest to an Impaired Contract, Is Protected by the Contract Clause of the United States Constitution, Article 1, Section 10.**

II. **Whether the Tennessee State Legislature in Promulgating T.C.A. §§13-828 Through 13-831, Unconstitutionally Impaired Existing Contractual Obligations, in Violation of the Contract Clause of the United States Constitution, Article 1, Section 10.**

The lower courts have held that a local governmental agency whose contracts have been impaired has no protection under the Contract Clause, Article 1, Section 10, of the United States Constitution. Your plaintiff respectfully insists that a local governmental agency does have the protection of Article 1, Section 10, of the United States Constitution, and that the Tennessee State Legislature, in promulgating T.C.A. §§13-828 through 13-831, unconstitutionally impaired existing contract obligations. With respect to the latter issue, your plaintiff relies on this Honorable Court's decision in *United States Trust Co. v. New Jersey*, 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed.2d 92 (April, 1977).

STATEMENT OF THE CASE

Your plaintiff would respectfully state to the Court that, pursuant to Rule 40 of the Supreme Court Rules, references are to be made to the record or appendix on issues which are material to the consideration of the questions presented. The Court of Appeals of the State of Tennessee in its Opinion affirmed for the purposes of its Opinion that the factual issues in dispute were resolved in favor of the plaintiff and narrowed its decision down to the question as to whether or not a local governmental agency had the protection of the Contract Clause, Article 1, Section 10, of the United States Constitution. The state court in its Opinion stated as follows:

> ". . . Consequently, for purposes of this opinion, we will assume *arguendo* that plaintiff is in the position of a party to all the contracts involved, that the franchise contracts do require relocation of defendants' facilities at defendants' cost, and that there has been some impairment of all the contracts involved."

(A. 26)

Thus, the Court of Appeals below, having disposed of the preliminary issue of the application of the Contract Clause to the plaintiff governmental agency, did not decide the issue of whether the State Legislature unconstitutionally impaired existing contractual obligations. Plaintiff raises both issues of law again on this appeal. The factual statements contained herein, however, are primarily derived from the Court of Appeals' Opinion with references largely being made thereto rather than to the record in this cause.

The plaintiff is a governmental agency which was established pursuant to a procedure set out in the Tennessee Code Annotated that is, in effect, enabling legislation and is known as T.C.A. §§13-901, *et seq*. This legislation allows cities and/or

counties, if they so desire, to create and to establish within their geographical area a public housing authority to carry out, under the laws of the State of Tennessee, both public housing programs and urban renewal programs, presently referred to as "community development programs."

The City of Nashville in approximately 1938 did so elect to create a housing authority, and this housing authority was recognized and its existence affirmed when the City of Nashville and the County of Davidson consolidated their forms of government into a metropolitan form of government. Said housing authority is recognized in Section 18.04 of the Charter of the Metropolitan Government of Nashville and Davidson County, Tennessee.[1]

The housing authority is regulated and controlled by an independent board of five (5) commissioners, whose terms are created pursuant to the Housing Authorities Law and who are appointed by the mayor or county official and confirmed by the governing body. The operating budget comes from income from public housing and subsidy income from the federal government for the operation of public housing. Income for its urban renewal programs comes through loans and grants from the federal government and income from the sale of project land. The housing authority has the right to borrow funds to make mortgages, to hold property in its own name and other numerous powers, one of the more significant powers being the right to sue and to be sued.[2]

Within the County of Davidson at the time this lawsuit was originally filed in the Chancery Court of Davidson County, Tennessee, there were three (3) multi-million dollar urban renewal projects being conducted and carried out by the plaintiff. The

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[1] Once a housing authority is created, it becomes an agency of the city and not a state agency. *Knoxville Housing Authority v. City of Knoxville*, 174 Tenn. 76, 123 S.W.2d 1085 (1939).

[2] T.C.A. §13-804(25).

budgets that had been established for these projects provided nothing for utility relocation in the event any utility company's lines had to be relocated within the geographical boundaries of the projects. Years before these projects were begun, franchise agreements were entered into between the City of Nashville and the individual utility companies, the defendants herein with the exception of the Electric Power Board. The Electric Power Board is an agency of the Metropolitan Government of Nashville and Davidson County, Tennessee, and provides its services to the public through the Nashville Electric Service. Said defendant holds a relationship similar to that between the plaintiff and the Metropolitan Government. In the franchise agreements, the utility companies agreed with the City of Nashville that, as part of the consideration of being allowed to operate within the City and to have their facilities infringing upon the City's rights-of-way, etc., the utility companies would relocate their utility lines and facilities at their own expense if said relocation became necessary or required by the City. (A. 36-37, 42, 45, 59-60, 66)

In 1971, the Legislature of the State of Tennessee enacted legislation which, in part, provided that, in the event any utility lines had to be relocated within an urban renewal project boundary, the cost of the relocation would not be borne by the utility company but by the urban renewal agency. Said statute is quoted on pages 2-3, *supra*. (A. 1-4)

The Tennessee Court of Appeals found below that, at the time this statute was enacted, the existing franchise agreements required the utility companies to relocate their facilities at their own expense when requested to do so by the City of Nashville. (A. 21) Further, the City Council had approved the urban renewal plans and the budgets which did not provide for any utility relocation expenses. Said budgets had been forwarded to the United States Department of Housing and Urban Development and approved by it in written contracts requiring the plaintiff to carry out the urban renewal projects. In accordance with

the existing franchise agreements, there were no provisions for payment of utility relocation within the projects' boundaries contained in those contracts with the Department of Housing and Urban Development. (A. 21) Testimony in this case showed that the estimated cost which would have to be paid by the plaintiff for the relocation of utilities in these projects would be in excess of $2.1 million. (A. 23) There, of course, is no estimate as to future development programs in the community served by the plaintiff or in other communities throughout the State of Tennessee, or of the financial effect of this legislation on other ongoing urban renewal programs in other parts of the State. This amount was only as to Nashville and the specific three (3) projects in question.

On October 31, 1973, your plaintiff filed this suit in the Chancery Court of Davidson County, Tennessee, asking for a declaratory judgment to the effect that T.C.A. §13-828, *et seq.*, impaired the obligations of the franchise agreements between the City of Nashville and the utility companies and, further, was an impairment of the contracts entered into between the plaintiff and the United States Government which were sanctioned by the Metropolitan Council of Nashville and Davidson County, Tennessee. (A. 4-14)

The Chancellor found, among other things, that the legislation did not violate Article 1, Section 10 of the United States Constitution, nor Article 1, Section 20 of the Constitution of the State of Tennessee. (A. 15, 18) From this opinion, an appeal was taken to the Tennessee Court of Appeals. As was previously pointed out, even though the Court of Appeals found that there were some factual disputes over some of the issues heretofore set out, the Court elected to bypass the factual disputes and go straight to the question as to whether the plaintiff in this case would have the protection of the Contract Clause, assuming that this legislation did impair the franchise agreements and assuming that said agreements were in effect and

binding upon the parties as set out under plaintiff's theory of the case. The Court of Appeals found as follows:

> "Sections 13-828—13-831 of Tennessee Code Annotated cannot be held to impair the contracts of plaintiff in this case because plaintiff, as an agency created by the State of Tennessee, cannot claim the constitutional protection of the contract clause against the alleged impairment of these contracts by the State." (A. 26)

From this opinion, certiorari was taken to the Supreme Court of the State of Tennessee and denied; hence, this appeal.

ARGUMENT

I. Whether a Local Governmental Agency, Who Is a Party in Interest to an Impaired Contract, Is Protected by the Contract Clause of the United States Constitution, Article 1, Section 10.

The first substantial federal question presented in this case involves whether a local governmental agency, whose contract is impaired, is protected by the Contract Clause of the United States Constitution. Plaintiff believes this to raise a substantial federal question, despite prior adverse case law, in light of the peculiar facts presented in the case at bar.

This Court recently decided *United States Trust Co. v. New Jersey*, 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed.2d 92 (April, 1977), which dealt with facts similar to those in the case at bar, the major difference being the party who brought the suit. In *United States Trust Co., supra*, the Court had before it the Port Authority (which is a governmental agency) who was not the plaintiff but who was the agency whose contract had been impaired. The trust company that held some bonds issued pursuant to the enabling legislation brought the suit claiming that subsequent legislation had impaired the bondholders' rights. The defendant in the case was the State of New Jersey. In the case at bar, the public agency, the plaintiff herein, brought this suit as it was given authority to do by the State Legislature. See T.C.A. §13-804(25). This suit, though brought by the public agency, if successful, will inure to the benefit of the taxpayers whose tax monies will have to be used to pay for the relocation of utility lines, although the utility companies had previously contracted to relocate these lines at their own expense. The beneficiaries of these impaired contracts are the defendants, and the ultimate burden of any imposed impairment lies with the state and federal taxpayers.

Although in previous cases this Court has not applied the Contract Clause to cities or municipalities, plaintiff contends that those prior cases are distinguishable from the case at bar and do not preclude appellant the protection of the Contract Clause. In *Trenton v. New Jersey*, 262 U.S. 182, 43 S.Ct. 534, 67 L.Ed. 937 (1923), and *East Hartford v. Hartford Bridge Co.*, 51 U.S. 511 (10 How. 511), 13 L.Ed. 518 (1850), this Court held in essence that contracts between a city and the state are always subject to change or regulation by the state legislature. The obligations impaired here, however, do not exist between a city and its state, but between a city agency and local utility companies.

In *City of New Orleans v. New Orleans Water Works Co.*, 142 U.S. 79, 12 S.Ct. 142, 35 L.Ed. 943 (1891), and *Worchester v. Worchester Consol. Street R. Co.*, 196 U.S. 539, 25 S.Ct. 327, 49 L.Ed. 591 (1905), the parties involved are admittedly more analogous to the case at bar; however, the factual situations are easily distinguishable from the present case.

In *New Orleans, supra*, this Court held that New Orleans could be required by the act of the state legislature to pay the local water works for water supplied during the years that the water works had been taxed by the city. This act of the state legislature was upheld because the contract the act allegedly had repudiated had been voided by actions of the city. In the present case, however, there is no question as to the validity of the impaired contracts. Furthermore, in *New Orleans, supra*, the state legislature was in effect acting to cure an inequity suffered by the water works which had been taxed by the city, contrary to a previous contract between the parties. In the present case, the State Legislature's actions create an inequity which had heretofore been cured by prior franchise agreements.

In *Worchester, supra*, this Court held as follows:

> ". . . the legislature, in the exercise of its general legislative power, could abrogate the provisions of the contract between the city and the railroad company with the assent of the latter, and *provide another and a different method* for the paving and repairing of the streets through which the tracks of the railroad company were laid under the permit of their extended location."

196 U.S. at 548, 255 S.Ct. at 329, 49 L.Ed. at 595 (emphasis added). In *Worchester*, in contrast to the case presently at bar, the legislature was providing a different method pursuant to which the streets would be paved and repaired.[3] In the present case, plaintiff has been deprived of at least $2,100,000, with no available alternative method of financing utility line relocation. Also, the Court in *Worchester* was not dealing with actual contracts, as does the present case, but rather the *Worchester* Court assumed for the sake of argument that a series of ordinances and decrees constituted a contract between the city and the railroad. Furthermore, the repercussions in the present case are far more extensive than those in *Worchester*, for the legislation questioned in the case at bar, if upheld, potentially could jeopardize urban renewal projects and other budgeted projects across the state. Even in *Worchester*, however, the Court stated:

> "In general it may be conceded that it [a municipal corporation] can own private property, not of a public or governmental nature, and that such property may be entitled, as is said, 'to constitutional protection.' Property which is held by these corporations upon conditions or terms contained in a grant and for a special use, may not be diverted by the legislature."

196 U.S. at 551, 25 S.Ct. at 330, 49 L.Ed. at 596. In so stating, the Court relied on *Tippecanoe County v. Lucas*, 93 U.S. 108, 23 L.Ed. 822 (1876), wherein the Court stated:

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[3] It is unclear exactly to what different method the Court here referred. It is suggested in language before the actual opinion that the state legislature had adopted a new system of taxation. Perhaps, the legislature felt the railroads should no longer be required to bear the cost of paving and repairing streets under the new system of taxation.

> "But property, derived by them [a municipal corporation] from other sources, is often held, by the terms of its grant, for special uses, from which it cannot be diverted by the legislature. In such cases, the property is protected by all the guards against legislative interference possessed by individuals and private corporations for their property. And there would seem to be reasons equally cogent, in abstract justice, against a diversion by the legislature from the purposes of a municipality of property raised for its use by taxation from its inhabitants."

93 U.S. at 115, 23 L.Ed. at 824. From the above language and cases, it appears that this Court has never squarely held that the Contract Clause does not protect a municipal agency such as the plaintiff in the present case, in light of all the surrounding circumstances.

The position of the Court of Appeals of the State of Tennessee and the position of the defendants in their reply brief to the Supreme Court of the State of Tennessee is in effect that, even though there are impaired contracts in the case at bar, the plaintiff is not protected by the Contract Clause of the United States Constitution. The defendants argue with respect to the analogous *United States Trust Co., supra,* situation that, if the Port Authority of New York and New Jersey had brought the referenced suit challenging the impairment, this Honorable Court would have ruled that, even though individuals' as well as governmental agency's rights were violated, the impairment would be overlooked, and there would be no impairment protected by the United States Constitution, due to the fact that the governmental agency had brought the suit.

Your plaintiff respectfully submits that, if the contractual impairment exists, there are individual interests which are affected and that the logical party to bring the suit is the agency here who is a party in interest to the contracts directly impaired.

Your plaintiff further submits that, if the impairment is allowed to remain, it will be the agency, the plaintiff, through whom millions of tax dollars will have to be paid.

II. Whether the Tennessee State Legislature in Promulgating T.C.A. 13-838 Through 13-831, Unconstitutionally Impaired Existing Contractual Obligations, in Violation of the Contract Clause of the United States Constitution, Article 1, Section 10.

The other substantial federal issue presented in this case involves a determination of whether the Tennessee Legislature unconstitutionally impaired contractual obligations when the body promulgated legislation in violation of Article 1, Section 10, of the United States Constitution, the Contract Clause. The plaintiff believes this issue to raise a substantial federal question in light of this Honorable Court's recent decision in *United States Trust Co. v. New Jersey,* 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed.2d 92 (April, 1977), in which this Honorable Court held violative of the Contract Clause legislation repealing a covenant between bondholders and the Port Authority of New York and New Jersey, said covenant which restricted the pledging of Port Authority bonds as security.

Prior to *United States Trust Co., supra,* the law concerning the Contract Clause was "largely illuminated" by two of this Honorable Court's decisions. See *United States Trust Co., supra,* 431 U.S. at 15-16, 97 S.Ct. at 1514, 52 L.Ed.2d at 105. In *Home Building & Loan Assn. v. Blaisdell,* 290 U.S. 398, 54 S.Ct. 231, 78 L.Ed. 413 (1934), considered "the leading case in the modern era of Contract Clause interpretation," 431 U.S. at 15, 97 S.Ct. at 1514, 52 L.Ed. 2d at 105; this Court upheld legislation which temporarily allowed for judicial extension of the time for redemption of a mortgage. In that decision this Court recognized that the state which had passed the legislation was under severe economic stress and that, as Chief Justice Marshall had

stated in *M'Culloch v. Maryland*, 4 Wheat. 316, 4 L.Ed. 579 (1819):

> "We must never forget that it is *a constitution* we are expounding[,] [4 Wheat. at 407, 4 L.Ed. at 601] . . . . a constitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs." [4 Wheat. at 415, 4 L.Ed. at 603].

290 U.S. at 443, 54 S.Ct. at 242, 78 L.Ed. at 431, quoting *M'Culloch v. Maryland*, 4 Wheat. 316, 407, 415 (1819), 4 L. Ed. 579, 601, 603 (emphasis added by the *Blaisdell* court). In *Blaisdell*, however, this Honorable Court also reiterated the "general purpose of the contract clause," which is "to encourage trade and credit by promoting confidence in the stability of contractual obligations.", *Blaisdell*, 431 U.S. at 15, 97 S.Ct. 1514, 52 L.Ed. 2d at 105, citing, *Id.* at 427-28, 54 S.Ct. at 235-36, 78 L.Ed. 422-23.

Subsequently, in *El Paso v. Simmons*, 379 U.S. 497, 85 S.Ct. 577, 13 L.Ed.2d 446 (1965), this Honorable Court reiterated the Contract Clause standards utilized in *Blaisdell, supra*. In *El Paso*, the Court upheld a state statute limiting to five (5) years the period in which an interest-defaulting purchase of land from the state could exercise his reinstatement rights. No statute of limitation had previously existed in respect to the exercise of this reinstatement right. The Court held that "it is not every modification of a contractual promise that impairs the obligation of contract under federal law." *Id.* at 506-07, 85 S.Ct. at 582-83, 13 L.Ed.2d at 453-54. The Court further observed, however, that "the power of a State to modify or affect the obligation of contract is not without limit. . . ." *Id.* at 509, 85 S.Ct. at 584, 13 L.Ed.2d at 455. The majority in *United States Trust Co., supra*, thusly described the impact of these two cases on the law of the Contract Clause:

> "Both of these cases eschewed a rigid application of the Contract Clause to invalidate state legislation. Yet

> neither indicated that the Contract Clause was without meaning in modern constitutional jurisprudence, or that its limitation on state power was illusory. Whether or not the protection of contract rights comports with current views of wise public policy, the Contract Clause remains a part of our written Constitution. We therefore must attempt to apply that constitutional provision to the instant case with due respect for its purpose and the prior decisions of this Court."

431 U.S. at 16, 97 S.Ct. at 1515, 52 L.Ed.2d at 106.

This Honorable Court in *United States Trust Co., supra*, held that the Contract Clause prohibited the retroactive repeal by two (2) state legislatures of a covenant restricting the pledging of Port Authority bonds as security. *Id.* at 32, 97 S.Ct. at 1523, 52 L.Ed.2d at 116. In reaching this holding, this Court applied certain standards to the disputed legislation. Upon applying these standards to the facts of the case presently at bar, it appears that the courts below did not correctly interpret the bounds of the Contract Clause of the United States Constitution.

Upon scrutinizing the Tennessee Legislature's acts in accordance with the standards applied by this Honorable Court in *United States Trust Co., supra*, it becomes apparent that T.C.A. §§13-828—831 fail to meet constitutional requirements. As stated in the above case, "[A]n impairment may be constitutional if it is reasonable and necessary to serve an important public purpose." *Id.* at 25, 97 S.Ct. at 1519, 52 L.Ed.2d at 112. Plaintiff contends the legislation presently disputed is neither reasonable nor necessary, since the sole effect of such legislation is to financially impair certain present urban renewal projects and to shift the financial burden of such relocation expenses from the utilities, who should most reasonably bear such costs, to the taxpayers of the federal and

local governments. The utilities should be relocated at the expense of the utility companies as provided for in the franchise agreements now impaired. Therefore, shifting the burden of bearing such costs hardly seems necessary.

Assuming, however, that this legislation were considered reasonable and necessary, T.C.A. §§ 13-828—831 do not pass the less drastic means test of *United States Trust Co., supra, id.* at 29-31, 97 S.Ct. at 1522, 52 L.Ed.2d at 114-15. In order to achieve the goal of shifting the financial burden of utility relocation away from the utilities, the Legislature could have made T.C.A. §§ 13-828—831 applicable only to prospective projects, so that projects budgeted in reliance on contract provisions for relocation as borne by the utilities, would not suffer extreme financial impairment, as estimated in this case to be $2.1 million. As this Honorable Court stated in *United States Trust Co., supra,* "[A] State is not free to impose a drastic impairment when an evident and more moderate course would serve its purpose equally well." *Id.* at 31, 97 S.Ct. at 1523, 52 L.Ed. 2d at 115. Therefore, the drastic and injurious impairment evidenced in the case at bar is not imposed in accordance with applicable constitutional standards.

The disputed legislation furthermore does not comply with the standard enunciated by Mr. Chief Justice Burger in the concurrence in *United States Trust Co., supra.* The Chief Justice stated:

> "In my view, to repeal the 1962 covenant without running afoul of the constitutional prohibition against the impairment of contracts, the State must demonstrate that the iment was essential to the achievement of an important state purpose."

Id. at 32, 97 S.Ct. at 1523, 52 L.Ed.2d at 116. Sections 13-828—831 were not "essential to the achievement of an important state purpose," since the sole beneficiaries of this legislation were the defendant utilities. Plaintiff fails to perceive how benefiting utilities comes within the purview of "an important state purpose."

CONCLUSION

Your plaintiff respectfully requests the Court to find that, as a governmental agency, it is afforded the protection of the Contract Clause of the United States Constitution, Article 1, Section 10; and, to find that the contracts to which the plaintiff is a party in interest have been impaired by the passage of T.C.A. §§13-828—831; and further to find that said T.C.A. §§ 13-828—831 are unconstitutional as these sections result in contractual impairment in violation of the Contract Clause of the United States Constitution.

Respectfully submitted,

JOSEPH L. LACKEY, JR.
Attorney for Plaintiff-Appellant

Certificate

I hereby certify that copy of the foregoing has been deposited in a United States Post Office or mail box, with first class postage prepaid, to Honorable Harry Mittwede, 1214 Church Street, Nashville, Tennessee 37203, and to Honorable J. O. Bass, First American Center, Nashville, Tennessee 37238, Attorneys for Defendants.

JOSEPH L. LACKEY, JR.
Attorney for Plaintiff-Appellant

APPENDIX

13-828. Relocation of utility facilities—Findings and declarations.—(a) The findings and declarations made in § 13-821, with respect to slum, blighted, and deteriorated areas are hereby affirmed and restated.

(b) Redevelopment and urban renewal project areas include streets, alleys, easements, and other public ways in, under, and over which utility facilities are installed. Public streets and alleys are intended for public travel and transportation; but they are also intended for proper utility uses in serving the public, as authorized by applicable laws of this state, and such utility usage is for the benefit of the public served. Without making use of public ways utility lines could not reach or economically service the adjacent public, particularly in urban areas; and further:

(1) the business and activities of utilities involve the rendition of essential public services vital to the health, safety and welfare of the citizens of this state, and

(2) the development and existence of utilities directly and vitally affects the development, growth, and expansion of the general welfare, business and industry of this state, and

(3) all persons in this state are actual or potential customers of one or more utility services, and all consumers will be affected by the cost of relocation of their facilities as necessary to accommodate redevelopment and urban renewal projects.

(c) The obligation of such utility relocation is a burden on the public of this state and it is, therefore, in the public interest that such burden be minimized consistent with the purpose of such redevelopment and urban renewal projects; therefore, it is the intent of the legislature to insure that the police power of the state in requiring relocation of utilities be exercised in a responsible manner.

(d) The cost of utility relocation necessitated by redevelopment and urban renewal projects undertaken in accordance

with the housing authority law, §§ 13-801-13-827, and any amendments thereto, are properly a part of the cost of such projects and it is in the public interest to provide for the equitable reimbursement of such cost of relocation; therefore, such relocation cost shall be included as part of the project costs of such redevelopment and urban renewal projects.

(e) The statements in this section are legislative determinations and declarations of public policy and §§ 13-828-13-831 should be liberally construed in conformity with its declaration and provisions to promote the public interest. [Acts 1971, ch. 197, § 1.]

13-829. Definitions.—As used in §§ 13-828-13-831, unless the context requires otherwise:

(a) "Utility" includes all utilities either public, private, or cooperatively owned who furnish utility service including but not limited to water, electric power, sanitary sewers, storm sewers, steam power, gas, and telephone or telegraph service through a system of pipes, conduits, cables, or wires devoted to public utility service.

(b) "Cost of relocation" means the entire amount paid properly attributable to such relocation, after deducting therefrom any increase in the value of the new facility and any salvage value derived from the old facility.

(c) "Public service facility" means any sewer, pipe, main, conduit, manhole, cable, wire, pole, tower, building, or utility appliance owned or operated by a utility.

(d) "Relocation" means any horizontal or vertical movement of utility facilities intact and any protective measures taken or the construction of new or additional facilities (with or without contemporaneous removal and salvage of old facilities), including removal, readjustment, rerouting, or changing the grade of

or alternating the construction of any public service facility, either temporarily or permanently, whether or not such relocation is made necessary by the closing of any highway, street, public alley or public right-of-way or the taking of easements whether publicly or privately owned. [Acts 1971, ch. 191, § 2.]

13-830. Reimbursement of cost of moving utility facilities.—Whenever a municipality, housing authority, or other public body of this state determines that the relocation of public service facilities of a utility within a redevelopment or urban renewal project area is necessary to the carrying out of a redevelopment or urban renewal plan pursuant to the provisions of the housing authority law, the municipality, housing authority, or other public body shall reimburse the utility for the cost of relocation of such facilities. [Acts 1971, ch. 191, § 3.]

13-831. Exceptions.—Sections 13-828-13-831 shall not apply to any taking or damaging of property for which the utility is entitled compensation pursuant to the constitution of Tennessee or the United States or pursuant to any binding agreement inuring to the utility's benefit. [Acts 1971, ch. 191, § 4.]

18-832. Continuing counseling and education programs for tenants of housing projects.—In the operation and management of housing projects an authority may assist in the establishment of and development of a continuing program of counseling and education for its tenants on household management, self-help, budgeting and money management, consumer education and related counseling and educational services which will assist its tenants in improving their living conditions and ability to purchase a home. Such program may include a credit union for the tenants. Such programs should be developed and scheduled to encourage maximum participation of the tenants. [Acts 1972 (Adj. S.), ch. 668, § 1.]

13-833. Private property—Taking by eminent domain restricted under certain conditions.—A housing authority created

under this chapter shall not have the power to take by eminent domain private property in an urban renewal area for the purpose of resale, if the owner of same desires to develop his own property and if the designated reuse of said property in the urban renewal plan is such that the owner's parcel can be redeveloped by itself without affecting the objectives of the urban renewal plan as to the owner's parcel or adjoining or adjacent properties thereto, and said owner signs an agreement with the housing authority to abide by the urban renewal plan, in any development thereof. [Acts 1972 (Adj. S.), ch. 711, § 1.]

In the Chancery Court of Davidson County, Tennessee

Metropolitan Development and Housing agency, Plaintiff, vs. South Central Bell Telephone Company; Metropolitan Government of Nashville and Davidson County, Tennessee, Acting by and Through the Electric Power Board of Said Government; Nashville Gas Company; Colonial Pipeline Company; and The Western Union Telegraph Company, Defendants.	No. .....

COMPLAINT

Comes the plaintiff, Metropolitan Development and Housing Agency, and in seeking a declaratory judgment among the parties, would respectfully show unto the Court:

I

1. That the plaintiff, Metropolitan Development and Housing Agency, is an agency of the Metropolitan Government of Nashville and Davidson County, Tennessee, created by authority of Chapters 8 through 11 of Title 13 T.C.A. and by § 18.04 of the Charter of Metropolitan Government of Nashville and Davidson County, Tennessee, pursuant thereto;

2. That the defendant, South Central Bell Telephone Company, is a regulated public utility engaged in the business of providing telephone services in areas certified to it by the Tennessee Public Service Commission, including all of the area of Metropolitan Nashville and Davidson County;

3. That the defendant, Metropolitan Government of Nashville and Davidson County, Tennessee, acting by and through the Electric Power Board of said Government, is an agency of the Metropolitan Government of Nashville and Davidson County, said duties, authorizations, and powers being enumerated in Appendix 3 to the Charter of said Government;

4. That the defendant, Nashville Gas Company, is a regulated public utility engaged in the business of furnishing natural gas to customers in areas certified to it by the Tennessee Public Service Commission, including all of the area of Metropolitan Nashville and Davidson County;

5. That the defendant, Colonial Pipeline Company, is a corporation organized under the laws of the State of Delaware and authorized to do business in the State of Tennessee, said pipeline being used for the purpose of transporting petroleum products to its terminal facilities within the territory of the Metropolitan Government of Nashville and Davidson County, Tennessee; and

6. That the defendant, The Western Union Telegraph Company, is a regulated public utility in the State of Tennessee and authorized by contract contained in Chapter 2, Part 8, of Volume 2 of *A. G. Ewing, Jr., and F. M. Garard—Laws of Nashville.*

II

7. That the Tennessee General Assembly in 1971, passed into law House Bill 895, now codified as Tennessee Code Annotated 13-828 through 13-831, said Act relating to the relocation of utility facilities made necessary by redevelopment and urban renewal projects pursuant to the provisions of the Housing Authorities Law, providing for the reimbursement of the cost of such relocation, and containing declarations of public policy.

III

8. That on October 16, 1988, by ordinance, the City of Nashville granted to the Cumberland Telephone & Telegraph Company a "right to erect and maintain in operation poles, cables, wires, cross-arms, boxes, switchboards, etc." on and over the various rights-of-way of the City of Nashville; that said ordinance further provides that there would be no permit fees for excavation, etc., required of the company, but rather that the said telephone and telegraph company pay $1.00 on every box actually in use, this to be in lieu of all other payments and taxes except a water tax; that, in further consideration of said franchise ordinance, the company is required to remove and replace any and all items of property owned by them when by any municipal project such removal is required in order to alter, amend, or improve any property within the City; and that this agreement has been ratified as each change was made in the name or corporate entity of the original Cumberland Telephone

& Telegraph Company between said company and the City of Nashville until April 1, 1963, the effective date of the metropolitan form of government, when this agreement as written was applied throughout the entire County encompassed by the Metropolitan Government of Nashville and Davidson County, Tennessee, with the then above-named defendant, South Central Bell Telephone Company.

IV

9. By ordinance of the City of Nashville found in the Laws of Nashville, Volume II, at page 553, an agreement was entered into between said City and the Nashville Gas and Heating Company, wherein said gas company was given the right to use and maintain their pipes and extend same under the streets and other rights-of-way of the City of Nashville; that, in return for right granted the company by the City of Nashville, said company was authorized to construct, acquire, maintain, and operate gas works in the City of Nashville and to manufacture, sell, and supply gas in the City of Nashville and to buy, use and maintain pipes and extend existing conduits and mains with all the necessary appurtenances below the surface of the streets, avenues, sidewalks, alleys, and public grounds of the City of Nashville; that said conduits and mains with all necessary and proper attachments and connections may be so installed without the requirement on the part of the company to acquire and own property either in fee, rent, or the acquisition of easements from the City of Nashville; and that, in further consideration of said franchise ordinance, the company is required to remove and replace any and all items of property owned by them when by any municipal project such removal is required in order to alter. amend, or inprove any property within the City. That this ordinance is still in effect between the Metropolitan Government and the defendant, Nashville Gas Company, successor to Nashville Gas and Heating Company.

V

10. That, for the right, privilege, and permission to lay and construct its pipeline, the defendant, Colonial Pipeline Company, agreed with the Metropolitan Government of Nashville and Davidson County, Tennessee, in its franchise agreement found in Metropolitan Ordinances 63-104 and 72-252 with amendments, to pay the Metropolitan Government as an annual charge the sum equal to one cent ($.01) per inch of diameter for each foot of pipeline installed under and along said streets, alleys, squares and highways in the territorial limits of the Metropolitan Government; and that, in the franchise agreement, said pipeline company has agreed that wherever said pipeline is located in, under, through, across, or along any streets, alleys, squares, or highways of the Metropolitan Government, the same shall be relocated at the expense of the Colonial Pipeline Company when the space occupied by such pipeline shall be needed for the purpose of the Metropolitan Government, the State of Tennessee, or any other public authority.

VI

11. That the defendant, The Western Union Telegraph Company, under the above-mentioned contract, shall have the right and privilege of running its wires across, over and along the streets and alleys of the Metropolitan Government of Nashville and Davidson County, Tennessee, without any charge being made for said use. That, as a condition to the franchise granted said company by the municipality, it is the duty of said company at all times to route its wires where authorized by the Mayor and the Metropolitan Council of said Government.

VII

12. Section 4 of the Act, codified as 13 T.C.A. 831, provides for an exception to the general provisions of the Act in the following language:

"Section 4. This Act shall not apply to any taking or damaging of property for which the utility is entitled compensation pursuant to the constitution of Tennessee or the United States or *pursuant to any binding agreement inuring to the utility's benefit.*" [Emphasis ours.]

VIII

13. That the defendants maintain that they are entitled to be reimbursed for their expenses as described in T.C.A. 13-828 and 13-830.

IX

14. That the plaintiff, Metropolitan Development and Housing Agency, maintains that as to the defendants, South Central Bell Telephone Company, Nashville Gas Company, Colonial Pipeline Company and Western Union Telegraph Company, they come under the exception of the Act in controversy as enumerated in paragraph 11 hereof; and as to the defendant, Electric Power Board, it further is the position of the plaintiff that it is not a "utility" as defined in T.C.A. 13-829(a) and, therefore, not an entity intended to be covered by the General Assembly upon the passage of this Act.

X

15. That the plaintiff, Metropolitan Development and Housing Agency, has been and is in the process of carrying out urban renewal projects that have necessitated the relocation of utility lines by all of the defendants in this cause and that the defendants have made claims or on information and belief the Metropolitan Development and Housing Agency is advised claims will be made for reimbursement for these relocation utility expenses and have or will rely on 13 T.C.A. 831. Your plaintiff avers

that the said defendants are not entitled to payment to this statute and have so advised the defendants that have made claims. As a result of the public interest demanding same and in order to get the utilities relocated, plaintiff has entered into agreements with South Central Bell Telephone Company, Nashville Electric Service and Nashville Gas Company that payment would be made for the relocation of the utilities with the understanding that the said defendants would refund any such payments to the plaintiff in the event it was determined by court of competent jurisdiction that the defendants are not entitled to payment of same. These agreements are attached as Exhibits A, B, and C. Your plaintiff avers that the statute is an unconstitutional impairment of pre-existing contractual relationships between the parties, therefore, not binding on the plaintiff and unconstitutional as to any such contractual impairment or, in the alternative, the defendants are not entitled to payment for the reasons set out herein.

XI

16. That included herewith and made a part of this Complaint are certified copies of the referenced ordinances which enable the defendants to operate within the limits of Metropolitan Nashville and Davidson County, Tennessee, and are marked Exhibits D through I.

XII

17. Your plaintiff further avers that the defendant, Electric Power Board, derives its power through the Metropolitan Government of Nashville and Davidson County, Tennessee, and is an agency of said Government the same as the plaintiff is an agency of said Government. Incorporated into the urban renewal plans and Cooperation Agreement entered into by the Metropolitan Government and the plaintiff, both of which have

been approved by the Metropolitan Government through the Mayor and Council, was a budget that contemplated relocation of utility work within said urban renewal projects; and part of the consideration flowing to the Metropolitan Government in said urban renewal programs was the credit that would be received by the Metropolitan Government for its one-third (⅓) share of the cost of said urban renewal programs as a result of said utility relocation. The Electric Power Board, by now asserting a claim pursuant to the statute in question, not only eliminates the obtaining of the credit but by requesting said payment will cause the Metropolitan Government to be exposed to the loss of the credit and paying its proportionate share of the cost of the claim. Your plaintiff avers that such previous actions on the part of the Metropolitan Government in applying said relocation costs toward its local one-third (⅓) share in the budget of these projects is now estopped from making a claim for said relocation of utility expenditures within the project areas.

PREMISES CONSIDERED, PLAINTIFF, THEREFORE PRAYS:

1. That proper process issue to compel said defendants to appear and answer this Complaint; but that their answers on oath are expressly waived.

2. That the Court determine and declare the rights of the parties under the provisions of T.C.A. 13-828 through 13-831.

3. That the Court declare that the statute is not binding between the plaintiff and the defendants as a result of the previously existing relationships between the parties or, in the alternative, declare that said statute is unconstitutional.

4. That the Court order that any payments made by the plaintiff pursuant to the agreement set out herein be refunded to the plaintiff with interest by the defendants.

5. That such further and general relief as the Court may deem the plaintiff is entitled in the premises.

JOSEPH, L. LACKEY, JR.
LACKEY, HARWOOD and ALEXANDER
Attorneys for Plaintiff

I am surety for cost in this cause not to exceed $250.

. . . . . .

In the Chancery Court of Davidson County, Tennessee

Part I

Metropolitan Development and Housing Agency

vs.

South Central Bell Telephone Company, et al.

No. A-3081

AMENDMENT TO COMPLAINT

Comes the plaintiff and files an Amendment to the Complaint heretofore filed in this cause as follows:

The Complaint is hereby amended by adding a new Section XIII, paragraph 18 as follows:

18. Your plaintiff alleges that in carrying out the University Center Urban Renewal Area, Project Tenn. R-51, the Edgehill Urban Renewal Area, Project Tenn. R-69, and the Central

Loop G.N.R.P. Area-One, Project Tenn. R-72, the Metropolitan Development and Housing Agency to enter into cooperation agreements between the Metropolitan Development and Housing Agency and the Metropolitan Government; that in these cooperation agreements the Metropolitan Development and Housing Agency was authorized to make application for Federal assistance with the United States Department of Housing and Urban Development; and that this financial assistance was obtained from the Department of Housing and Urban Development, an agency of the United States Government, whereby Federal funds in the nature of capital grants and loans would be made available to the Metropolitan Development and Housing Agency for purposes of carrying out the Above urban renewal plans. Your plaintiff further alleges that at the time these contracts were entered into no provisions were made in said contracts for the financing of the relocation of any of the utilities owned by the defendants and located within the above project boundaries; that the passage of statute 13 T.C.A. 828 through 830 constituted an impairment of the previously existing contractual arrangements between the Metropolitan Development and Housing Agency and the Department of Housing and Urban Development, as entered into pursuant to the authority of the Housing Act of 1949 and the local ordinances approving the urban renewal plans and authorizing the cooperation agreements; and that this impairment of these contracts constitutes a violation of Article 11, Section 2, of the Constitution of the State of Tennessee and Article 1, Section 10, paragraph 1, of the Constitution of the United States.

The Complaint is further amended by adding the following paragraph:

19. Your plaintiff further alleges that the passage of 13 T.C.A. 828 through 830 impaired the contractual rights that existed between the defendant utility companies and the Metropolitan Government of Nashville and Davidson County, Ten-

nessee, of which your plaintiff is an agent and that said impairment is in violation of Article 11, Section 2, of the Constitution of the State of Tennessee and Article 1, Section 10, paragraph 1, of the Constitution of the United States.

JOSEPH L. LACKEY, JR.
Attorney for Plaintiff

Certificate of Service

I hereby certify that a copy of the foregoing Amendment to Complaint has been mailed to all attorneys of record in this cause and to the Attorney General for the State of Tennessee, this the 25th day of October, 1974.

. . . . . .

In the Chancery Court of Davidson County, Tennessee

Part I

Metropolitan Development and Housing Agency,
Plaintiff,
vs.
South Central Bell Telephone Company, et al.,
Defendants.
} No. A-3081.

DECREE

This cause came on to be heard before the Honorable Ben H. Cantrell, Chancellor, upon the pleadings, including all amend-

ments, thereto, exhibits, stipulation, oral evidence, and the entire record and briefs of counsel, upon consideration of all of which the Court has reached the findings and conclusions set forth in its written Opinion dated January 29, 1975, which is hereby ORDERED to be filed and made a part of the record in this cause; and the Court hereby declares and decrees as follows:

1. Chapter 191, Public Acts of 1971, now codified in T.C.A. §13-828 through §13-831, inclusive, is a valid and constitutional enactment.

2. Each of the defendants, South Central Bell Telephone Company, Nashville Gas Company, Colonial Pipeline Company, Western Union Telegraph Company, and Electric Power Board of the Metropolitan Government of Nashville and Davidson County, Tennessee, is a public utility within the meaning of said enactment and is entitled thereunder to be reimbursed by the plaintiff, Metropolitan Development and Housing Agency, for the cost of relocating their respective utility facilities when such relocation is, or has been since the enactment of said Act, required of said utilities for the carrying out of redevelopment or urban renewal plans or projects.

3. The right of each of said defendants to reimbursement is not barred, nor is the utility estopped, by any previously existing relationship between it and the plaintiff.

4. The plaintiff is not entitled to recover payments, if any, already made by the plaintiff to any of the defendants pursuant to non-prejudice agreements between the plaintiff and any defendants; and, as provided in said statutory provisions, the plaintiff is obligated to pay each defendant relocation costs, if any, incurred by such defendant to the extent such costs have not already been paid by plaintiff as required under the aforesaid statutory provisions.

5. In the event the respective parties are unable to agree on the amounts due each defendant, upon proper application to the

Court a reference will be ordered to the Clerk & Master for a determination of all such amounts due, including interest.

6. The complaint in this cause is dismissed. The counter-claim or cross-complaint of the defendant, Electric Power Board of the Metropolitan Government of Nashville and Davidson County, Tennessee, is sustained but the amount due thereunder is not presently adjudicated and will await agreement of the parties or a later order of reference as provided in paragraph 5 above.

7. The costs of this cause are adjudged against the plaintiff, Metropolitan Development and Housing Agency.

To the foregoing action of the Court the plaintiff respectfully excepts.

This . . . day of February, 1975.

. . . . . .
Chancellor

. . . . . .
Solicitor for Plaintiff

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Solicitor for Defendant, Electric Power Board, etc.

. . . . . .
Solicitor for Other Defendants

MEMORANDUM

This is a declaratory judgment suit filed by Metropolitan Development and Housing Agency (Housing Authority) which seeks a declaration of its obligation under T.C.A. § 13-828 through

13-831 to reimburse the defendants, all public utilities, for relocation of their public service facilities. These facilities exist within areas selected for urban renewal projects and such relocation is necessary to accommodate the carrying out of such projects. Prior to the enactment of the above statute, utilities were required to pay the costs of relocating their facilities to make way for an urban renewal project.

T.C.A. § 13-830 and 13-831 provide:

> "13-830 Reimbursement of cost of moving utility facilities.—Whenever a municipality, housing authority, or public body of this state determines that the relocation of public service facilities of a utility within a redevelopment or urban renewal project area is necessary to the carrying out of a redevelopment or urban renewal plan pursuant to the provisions of the housing authority law, the municipality, housing authority, or other public body shall reimburse the utility for the cost of relocation of such facilities."

> "13-831 Exceptions.—Sections 13-828-13-831 shall not apply to any taking or damaging of property for which the utility is entitled compensation pursuant to the constitution of Tennessee or the United States or pursuant to any binding agreement inuring to the utility's benefit."

The plaintiff contends that the above statute is not binding on the plaintiff with respect to these defendants because of the previously existing relationships between the parties, or, in the alternative, that the statute is unconstitutional as being one impairing the obligation under previous contractual agreements.

The Court finds that all of the defendants are utilities within the meaning of T.C.A. § 13-830 and 13-831. The Court further finds that prior to the enactment of the above statute all the utilities had to bear the burden of relocation expenses.

The Court concludes that the above statute is a valid enactment of the legislature and requires the plaintiff Housing Authority to reimburse these utilities for the cost of relocation brought about by the urban renewal plan. The plaintiff is not a party to any contract with these utilities, therefore the statute does not affect any agreements between the parties.

Assuming that the franchises held by the phone company, gas company, Western Union and the pipepline company provided for uncompensated relocation of facilities, the legislature may change the relationship of the parties without being in violation of Article I, Section 20 of the Constitution of Tennessee. The legislature may relieve the utility from the obligation to relocate its facilities and such relief does not violate the contract clause of the Constitution. See *Pack v. Southern Bell Tel. & Tel.*, 215 Tenn. 503, 387 S.W.2d 789 (1964). The Court is of the opinion that the decision in *Pack, supra,* is controlling here and attempts to distinguish the cases are ineffectual.

There remains one other question with respect to Nashville Electric Service. Plaintiff contends that NES is estopped to deny liability for the relocation expense involved in this case. The basis of the estoppel is the assertion that the Metropolitan Government is estopped and NES, being an agency of Metropolitan Government, is likewise estopped. The Court is of the opinion and so holds that any estoppel against the Metropolitan Government would not be binding on the Electric Power Board. The Metropolitan Government in its cooperate capacity has no authority to bind the Electric Power Board except as specifically provided by the Metropolitan Charter. The Court can find no basis on which to hold that the Electric Power Board is estopped from claiming the benefits of the statute in question.

It results therefore that the complaint in this cause should be dismissed and judgment entered on the counterclaims for the relocation expenses as they are determined. Let the plaintiff pay the costs of the cause. Counsel for the Telephone Company will prepare the decree.

/s/ Ben H. Cantrell
Ben H. Cantrell, Chancellor

This January 29, 1975.

xc: Mr. Joseph L. Lackey, Jr.
Mr. J. O. Bass
Mr. T. G. Pappas
Mr. Harry Mittwede

Appealed From Chancery Court, Part I, for Davidson County, Tenn.

The Honorable Ben H. Cantrell, Chancellor.

Filed: October 28, 1977.

Joseph L. Lackey, Jr., Lackey, Alexander and Jackson, 421 Charlotte Avenue, Nashville, Tennessee 37219, Attorney for Plaintiff-Appellant.

J. O. Bass, Bass, Berry & Sims, 2700 First American Center, Nashville, Tennessee 37238, Attorney for Defendants-Appellees, South Central Bell Telephone Company, Nashville Gas Company, Western Union Telegraph Company, Colonial Pipeline Company.

Harry Mittwede, 1214 Church Street, Nashville, Tennessee 37246, Attorney for Defendant-Appellee Electric Power Board, Metropolitan Government, Nashville, Tennessee.

Affirmed.

FRANK F. DROWOTA, III
Judge

OPINION

In this suit for declaratory judgment, plaintiff Metropolitan Development and Housing Agency urges that a state statute which requires it to reimburse defendant utilities for the cost of relocating their equipment to further certain urban renewal projects is an unconstitutional impairment of several of plaintiff's contracts.

Plaintiff Metropolitan Development and Housing Agency, formerly the Nashville Housing Authority, is recognized at § 18.04 of the Charter of the Metropolitan Government of Nashville and Davidson County as both a city and county housing authority created pursuant to T.C.A. §§13-901-13-919 and §§13-1001-13-1011, respectively. These sections of the Code provide that such an agency is a "public body corporate" and charge it with carrying out the provisions of the Housing Authorities Law, Chapters 8 through 11 of Title 13 of the Code. The agency is vested by the State with a number of powers, many of which appear to have been designed to allow the agency to improve housing conditions in its area by the construction of new housing projects. See T.C.A. §§13-804-13-805.

Pursuant to its statutory authority, plaintiff in the 1960's and 1970's has embarked on three urban renewal projects in Nashville which have given rise to the instant suit. These projects are financed by loan and grant contracts between plaintiff and the federal Department of Housing and Urban Development (HUD). These contracts provide that the federal government will furnish ⅔ of the funds needed for the projects while the local authorities furnish the remaining ⅓. The local authorities receive "in-kind" credits toward their ⅓ share for work they actually do on the projects. Relocation of lines and equipment by defendant Electric Power Board, known as Nashville Electric Service (NES), an independent agency of the Metropolitan Government of Nashville and Davidson County

(Metro), would qualify for this in-kind credit if paid for by NES. Also involved in these projects are so-called "cooperation agreements" between plaintiff and Metro, contracts in which Metro agrees to cooperate with plaintiff and aid the urban renewal projects in specified ways.

In addition to the contracts between HUD and plaintiff and between Metro and plaintiff, a third set of contracts is important in this litigation. These are the franchise agreements entered into between Metro and each of the defendant utilities except NES. The franchises in each case are agreements in which the city gives the utility the right to maintain its facilities and do business within the municipal limits and on municipal rights of way, and which set forth various conditions with which the utility is required to comply. These franchise agreements are currently in force between Metro and the following defendant utilities: South Central Bell Telephone Company (South Central Bell), Nashville Gas Company (Nashville Gas), Colonial Pipeline Company (Colonial), and Western Union Telegraph Company (Western Union). NES, the only other defendant in the case, does not operate under a franchise agreement but, as an independent agency of Metro government, is controlled by provisions set forth in Appendix III to the Metro Charter.

The three urban renewal projects in question required the relocation of some equipment of all of the defendants in order to proceed. At common law, that is, in the absence of any valid legislative enactment to the contrary, the cost of such relocation is a non-compensable harm to the utility and must be borne by it. See *Pack v. Southern Bell*, 215 Tenn. 503, 387 S.W.2d 789 (1965). In the instant situation, the urban renewal plans were developed and most of the contracts discussed above were made when this was the state of the law. In 1971, however, the State legislature passed T.C.A. §§13-828-13-831, the statutory provisions attacked by plaintiff in

this case. After stating its findings and defining its terms in §§13-828 and 13-829, the legislature goes on to require utilities to be reimbursed for the cost of relocating their facilities for urban renewal as follows:

> 13-830. **Reimbursement of cost of moving utility facilities.**—Whenever a municipality, housing authority, or other public body of this state determines that the relocation of public service facilities of a utility within a redevelopment or urban renewal project area is necessary to the carrying out of a redevelopment or urban renewal plan pursuant to the provisions of the housing authority law, the municipality, housing authority, or other public body shall reimburse the utility for the cost of relocation of such facilities.
>
> 13-831. **Exceptions.**—Sections 13-828-13-831 shall not apply to any taking or damaging of property for which the utility is entitled compensation pursuant to the constitution of Tennessee or the United States or pursuant to any binding agreement inuring to the utility's benefit.

On October 31, 1973, plaintiff filed this suit for a declaratory judgment against defendant utilities. The gist of the complaint was that T.C.A. §§ 13-828-13-831 impair the obligations of plaintiff's contracts in violation of Article I, §10 of the United States Constitution and Article I, §20 of the Tennessee Constitution. Plaintiff claims that, insofar as the statute attempts to compel plainiff to bear the burden of the cost of relocating facilities of defendant utilities to make way for the three urban renewal projects discussed above, it unconstitutionally impairs obligations in plaintiff's contracts with HUD, in plaintiff's contracts with Metro, and in Metro's franchise agreements with defendant utilities. Specifically in regard to the franchise agreements, it is plaintiff's contention that they create a contractual obligation on the part of each utility to pay for relocation of its facilities, that plaintiff is a party that can enforce that obligation

because it is an agency of Metro, and that this obligation is unconstitutionally impaired by the requirement of §§13-828-13-831 that plaintiff pay the relocation costs. With regard to plaintiff's contracts with HUD and its cooperation agreements with Metro, plaintiff also alleges unconstitutional impairment, most notably by the loss of the in-kind credit that would have accrued to the local authorities had NES paid its own relocation costs. Plaintiff asked the court to declare that the statute could not constitutionally require it to reimburse these defendants because of the pre-existing contractual relationships between the parties. In addition to presenting its contract clause arguments, plaintiff also urged that the court hold NES equitably estopped to claim reimbursement under the statute because it had submitted estimates of its relocation costs that were used in planning the urban renewal projects.

Defendants' answers argued in support of the validity of §§13-828-13-831 as applied in the instant situation. Several defendants had entered "non-prejudice" agreements with plaintiff prior to this suit, whereby plaintiff agreed to pay their relocation expenses without prejudice to the rights of either party in the event of litigation over the statute's validity. Defendant NES, which had entered such an agreement but apparently had not been paid, included in its answer a counterclaim asking judgment in the amount of past relocation expenses as well as an adjudication of its entitlement to be reimbursed for those incurred in the future.

The case was heard in the Chancery Court of Davidson County on May 17, 1974. It was there brought out that NES had, pursuant to plaintiff's request, furnished plaintiff with estimates of its relocation costs, which plaintiff had relied on and used in its budgets for the projects and in its contracts with HUD. It was estimated that the total cost of relocation for all utilities would be approximately $2,100,000.00. Only the expenses of NES would be eligible for in-kind credit with HUD

if each utility bore its own costs because only NES is an agency of Metro government. A multitude of exhibits was introduced, including NES's relocation cost estimates, Metro ordinances approving the urban renewal plans and cooperation agreements executed in accordance with the ordinances, and the franchise agreements of several defendants. The record does not contain copies of the HUD contracts. Stipulations were entered at various times concerning the equipment owned by the several defendants and the cost of relocation in the urban renewal areas.

On January 29, 1975, the Chancellor filed a memorandum opinion in the case. He found that, prior to the statute's enactment, utilities were required to pay their own relocation costs, but that the statute is "a valid enactment of the legislature" which requires plaintiff "to reimburse these utilities for the cost of relocation brought about by the urban renewal plan." The court held that plaintiff was not a party to the franchise agreements between Metro and defendants, and that the statute therefore affected no agreements between the parties. Furthermore, the court assuming *arguendo* that the franchise agreements required uncompensated relocation of facilities by defendants, found that the legislature could relieve defendants of this obligation without violating the contract clause. The court also rejected plaintiff's contention that NES, due either to its own actions or to those of Metro, is estopped to claim reimbursement for its relocation expenses under the statute. On March 6, 1975, the Chancellor entered a decree dismissing the complaint and sustaining NES's counterclaim for reimbursement from plaintiff in accordance with §§ 13-828-13-831. Each defendant was declared entitled to payment under the statute and provision was made, in case of dispute over the amounts due, for reference to the Clerk and Master. Reference of the claim of defendant Nashville Gas was made to the Clerk and Master, who found that utility entitled to $83,637.48 in relocation costs from plaintiff. This amount was found already to have been paid by plaintiff under a non-prejudice agreement.

The report of the Clerk and Master was affirmed by the Chancellor's decree of December 1, 1976, which also holds plaintiff liable to NES in the total amount of $231,469.63 for relocation costs already billed to plaintiff and declares plaintiff liable for the cost of relocation not yet carried out by NES in the projects. Both NES and Nashville Gas excepted to the Chancellor's failure to allow interest on the amounts awarded to them for the period between the billing date of each expense and the date of judgment. Specific claims for reimbursement by defendants other than NES and Nashville Gas appear not to have been made, and the record contains no mention of the disposition of any such claims below.

The primary question for our consideration is the appeal of plaintiff from the Chancellor's upholding of the statute as it applies to plaintiff in this case. Plaintiff assigns as error the Chancellor's holding that the statute is constitutional as applied to it, his finding that plaintiff is not a party to the franchise agreements between Metro and defendants, and his conclusion that NES is not estopped to rely upon T.C.A. §§ 13-828-13-831. In addition to plaintiff's appeal, defendant NES also appeals to this Court and assigns as error the Chancellor's refusal to allow it interest on its various relocation expenses from the date each was billed.

It is obvious that plaintiff must establish a number of points to succeed in its attack upon the statute under the contract clause, which is the subject of its first and primary assignment of error. In regard to the franchise contracts between Metro and defendant utilities, plaintiff must show that it is a party or that there is some other reason for it to be given standing to attack the alleged impairment of those contracts. The Chancellor found that plaintiff was not a party, and this finding is attacked in plaintiff's second assignment of error. Plaintiff also, of course, must show that the franchise contracts with defendants do require defendants to relocate at their own expense, and there is some

doubt about this as well. Further, with regard to all the contracts involved, plaintiff has the burden of establishing an impairment within the meaning of the constitutional provision. These points and others have been briefed and argued to one extent or another, and it is far from clear that their resolution would be in plaintiff's favor. We believe, however, that there is another factor that is clearly dispositive of plaintiff's attack on the statute. Consequently, for purposes of this opinion, we will assume *arguendo* that plaintiff is in the position of a party to all the contracts involved, that the franchise contracts do require relocation of defendants' facilities at defendants' cost, and that there has been some impairment of all the contracts involved. We emphasize that we decide none of these points, and that there is serious doubt about many of them, but that we assume them in order to reach the dispositive issue in the case.

Sections 13-828-13-831 of Tennessee Code Annotated cannot be held to impair the contracts of plaintiff in this case because plaintiff, as an agency created by the State of Tennessee, cannot claim the constitutional protection of the contract clause against the alleged impairment of these contracts by the State. The case we find most nearly in point is *City of Worcester v. Worcester Consolidated Street Railway Co.*, 196 U.S. 539 (1905). In that case a municipality, acting under authority of state law, granted defendant railway company an extension of its lines on condition that the company lay and maintain pavement for a certain area around the track. At the time of this extension, defendant was under a state law obligation to keep its tracks and the street around them in repair, but the state later changed the law so that such maintenance was no longer required. Nevertheless, the city sued to enforce its "contract" with defendant, alleging that the state's change in the law impaired the obligation of that contract in violation of Article I, § 10 of the United States Constitution. The United States Supreme Court assumed that a valid contract had been created between the city and the company, but held that the state could constitutionally

abrogate such a contract as long as the *company* did not object. The Court said:

> A municipal corporation is simply a political subdivision of the state, and exists by virtue of the exercise of the power of the state through its legislative department. The legislature could at any time terminate the existence of the corporation itself, and provide other and different means for the government comprised within the limits of the former city. The city is the creature of the state.
>
> 196 U.S. at 548-49.

Mr. Justice Peckham supported the opinion with citations of and quotes from numerous earlier cases, notable among which are *New Orleans v. New Orleans Waterworks Co.*, 142 U.S. 79 (1891) and *Tippecanoe County v. Lucas*, 93 U.S. 108 (1876), which both involved contract clause problems very similar to that in the instant case. The conclusion of the Court in *Worcester* was that the municipality could not invoke the contract clause to prevent the state, its creator, from impairing a contractual obligation owed the municipality, at least insofar as the contract involved the municipality in a "governmental" rather than in a "proprietary" capacity. Other authorities have subsequently agreed with this conclusion, and it is the prevailing view. See E. Quillin, The Law of Municipal Corporations §§4.18 and 19.50 (3d ed. 1969), and cases there cited.

Tennessee law is in accord with the principles stated in the *Worcester* case and the other authority mentioned above. In *Memphis v. Enloe*, 141 Tenn. 618, 214 S.W. 71 (1919) it was recognized that a municipality is merely a creature of the State, and in *Demoval v. Davidson County*, 87 Tenn. 214, 10 S.W. 353 (1889) it was held that the State might by statute release the tax liability of a class of persons to a county, which is merely an "emanation of the State and only had the power to impose a tax obligation initially because the State had chosen

to bestow it. In *City of Knoxville v. State*, 175 Tenn. 159, 133 S.W.2d 465 (1939), the Court rejected the city's argument that a State statute unconstitutionally impaired the obligations of the city's contract with a teacher, saying "It was competent for the legislature to discharge any obligation created by its agents in favor of the State or its creatures." 133 S.W.2d at 469. Finally, in *State ex rel. Bell v. Cummings*, 130 Tenn. 566, 172 S.W. 290 (1914), the Court held that the legislature could, without violating the contract clause, order funds raised by a county bond issue used for a purpose other than that originally specified. The Court discussed and approved *Worcester*, and said:

> . . . a county as a mere arm of the sovereign power can have, as against the legislative power of the sovereign, no vested rights in the powers conferred upon it for governmental purposes. . . .
>
> 172 S.W. at 291.

Thus, *Worcester's* holding that a city could not invoke the contract clause to prevent the state from impairing a contractual obligation owed the city acting in its governmental capacity is in harmony with the law of Tennessee. We think that these principles preclude plaintiff MDHA from successfully asserting the contract clause against the State statute in the instant case. Plaintiff is an agency created under authority of State statute. It is also in many ways an agency of the Metro government. It is not, however, in a position any different from that of municipalities, counties, and other state-created entities for purposes of the principles espoused in *Worcester* and the other cases to which we have referred. Further, as appears more fully below, we do not find that the distinction noted in some of those cases between the "governmental" and "proprietary" capacities of such entities applies to allow constitutional protection to plaintiff with respect to any of the contracts involved in the instant case. We hold that neither Article I, §10 of the United States Constitution nor Article I, §20 of the

Tennessee Constitution affords plaintiff MDHA, an agency created under State authority and run under municipal auspices, protection from State statutory impairment of its contracts with HUD or with Metro, or of the franchise contracts between Metro and defendant utilities.

Plaintiff insists that it and Metro acted in a "proprietary" capacity in executing some or all of the contracts involved in this case, and that this entitles those contracts to constitutional protection from State impairment at plaintiff's request. There are at least two reasons for rejecting this contention. The first is that the concept that a state-created agency may invoke the contract clause against the State in regard to matters involving the agency on its "proprietary" capacity appears to have been abandoned by the U. S. Supreme Court. In *City of Trenton v. State of New Jersey*, 262 U. S. 182 (1923), the Court noted that, although previous cases such as *New Orleans, supra*, had referred to a distinction between the right of a municipality to invoke the contract clause against the State that created it in matters involving its governmental capacity and the same right in matters involving its proprietary capacity, the Court had never held that a municipality had that right in any capacity. The Court went on to interpret prior cases as requiring it to hold that a municipality can never assert the contract clause against its sovereign state, and concluded that the case before it presented no substantial federal question. In a 1933 case, *Trenton, Worcester*, and other cases were cited as supporting the following more general proposition:

> A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator.

Williams v. Mayor and City Council of Baltimore, 289 U.S. 36, 40 (1933). The general proposition that an agency created under the authority of a state does not have the substantive right

to attack a statute of that state on constitutional grounds has since been followed by the Court and by other jurisdictions. See, *e.g., Coleman v. Miller,* 307 U.S. 433 (1939); *Jeter v. Ellenville Central School District,* 41 N.Y.2d 283, 360 N.E.2d 1086, 392 N.Y.S.2d 403 (1977). It is obvious that if this principle is adhered to, plaintiff in the instant case cannot assert the contract clause against the State regardless of the capacity in which it acted in the circumstances surrounding the contract it seeks to protect.

The second reason for rejecting plaintiff's argument that the franchise agreements were executed by plaintiff and Metro in a proprietary capacity and so are entitled to constitutional protection against the State at plaintiff's request is simply that plaintiff and Metro were *not* acting in a "proprietary" capacity within the meaning of that word in the present context. In *Tippecanoe County v. Lucas,* 93 U.S. 108 (1876), it was explained that a municipal corporation's governmental capacity, for purposes of deciding whether or not that corporation can invoke constitutional protections against the state that created it, includes the control of property "derived from the state for specific public purposes, or obtained for such purposes through means which the state alone can authorize," such as taxation. 93 U.S. at 114. Constitutional protections were there said to be invocable only with regard to property obtained from other sources and held for special uses. This explanation of the "governmental/proprietary capacity" distinction was adopted in Tennessee in *Cummings, supra,* which contains a long quote from *Tippecanoe.* Nor is *Lewis v. Nashville Gas & Heating Co.,* 162 Tenn. 268, 40 S.W.2d 409 (1931), cited by plaintiff, to the contrary. That case does deal with the franchise agreement of defendant Nashville Gas, and it does use the word "proprietary" in reference to it, but it uses the term to describe the municipality's power to *contract* with the utility in contradistinction to its lack of "governmental" or sovereign authority to *regulate* rates absent a delegation to it of the State's police power. *Lewis* does not involve an attempt by a municipal corporation to assert the contract clause against the State; indeed, the opinion even declares in *dictum* that "the state probably could have suspended" the provision of the franchise agreement in dispute in that case. 40 S.W.2d at 412. It is clear that the "governmental/proprietary capacity" distinction for purposes of municipal invocation of the contract clause against the State, if it has any current validity, is properly set forth in *Tippecanoe* and *Cummings,* supra. Under that view, none of the contracts in issue in the instant case involve plaintiff or Metro in a proprietary capacity, for none involve property obtained by them by means other than those only the State could authorize. Thus, plaintiff can derive no benefit from this distinction.

We emphasize that our holding that T.C.A. §§13-828-13-831 do not unconstitutionally impair the obligations of any of the contracts involved in the instant case is based entirely on the circumstance that the challenge is raised by MDHA, a creature of the State and a municipal agency. Anyone not in that position would not be precluded by the principles applied in the instant case from attacking this statute or any other for impairing a contract to which he is a party. Certainly defendant utilities would have the right to attack the statute were it not that the statute "breached" their franchise agreements by releasing an obligation owed by them to the government, rather than vice versa. Similarly HUD, as a party to contracts with plaintiff, would have the right to sue the State if those contracts were impaired to HUD's detriment by §§13-828-13-831. This is so despite the fact that, should such a suit be brought against the State by a party not its creature, it seems likely that §§13-828-13-831 would be upheld on the merits against contract clause arguments as an exercise of police power that the State cannot contract away. See *City of Chattanooga v. Southern Ry. Co.,* 128 Tenn. 399, 161 S.W. 1000 (1913). An important factor in such a suit would be that our State Supreme Court has held a similar statute to be a proper exercise of the police power in

Pack v. Southern Bell, 215 Tenn. 503, 387 S.W.2d 789 (1965), though this would not be controlling because *Pack* did not involve the contract clause. In any event, we point out that such a contract clause challenge to the statute by a third party not created by the State is not the instant case, which concerns only a constitutional attack on a State statute by a state-created agency.

We now turn to plaintiff's argument of estoppel against NES. Basically, this argument rests on the circumstance of NES's having supplied plaintiff with cost estimates for relocation of its facilities and of their having been relied upon by plaintiff and Metro in making up budgets and entering the contracts involved in these urban renewal projects. In particular, plaintiff claims that these estimates were relied on in computing the amount of Metro's in-kind credit toward its ⅓ share of the projects' cost. Plaintiff, quoting Pomeroy's definition of equitable estoppel as found in *Church of Christ v. McDonald*, 180 Tenn. 86, 171 S.W.2d 817, 821 (1943), argues that these actions of NES and Metro estop NES to claim reimbursement for its relocation expenses under T.C.A. §§13-828-13-831. The Chancellor's ruling on this contention was that "[t]he Court can find no basis on which to hold that the Electric Power Board [NES] is estopped from claiming the benefits of the statute in question." We agree. While equitable estoppel as expounded in *McDonald* does not require fraudulent intent, it does require at least some voluntary action, such as intentional or negligent concealment of facts, which leads the other party to rely to his detriment by changing his position for the worse. Further, like all equitable doctrines, equitable estoppel is to be used to achieve fairness in dealings between parties. As we view the record, the evidence does not preponderate against the Chancellor's finding that the facts do not establish the requisite elements of an esuitable estoppel against NES. In addition, we note that it would indeed be odd if NES were held estopped to accept the benefits of a statute because its

truthful representations were relied on by plaintiff in entering into contracts, when we have already held that any impairment of the contracts themselves by that statute is entirely valid and constitutional as far as plaintiff is concerned. This assignment of error is overruled.

Finally, we consider the assignment of error raised by defendant NES. The action complained of is the Chancellor's disallowance of interest from the date of billing of the relocation expenses of NES, the only defendant to have affirmatively raised its claim for reimbursement and to have remained unpaid. NES does not claim that it is entitled to interest over that period as a matter of right, but admits that such an allowance in this case is within the discretion of the trial court under *Farmers Chemical Association, Inc. v. Maryland Casualty Co.*, 421 F.2d 319, 323 (6th Cir. 1970) (Tennessee law) and cases cited therein. NES contends that the Chancellor unreasonably exercised his discretion in failing to grant the requested interest and that it is only fair that this request be granted. We have considered NES's arguments on this point, but can find no abuse of discretion in the Chancellor's action. This assignment of error is accordingly overruled. NES's rights to interest from the date of judgment in accordance with T.C.A. §47-14-110, of course, are unaffected by this holding.

Affirmed.

/s/ FRANK F. DROWOTA, III, Judge

Todd, J., concurs.

Daughtrey, Sp. J., concurs.

IN RE: PETITION FOR WRIT OF CERTIORARI OF METROPOLITAN DEVELOPMENT AND HOUSING AGENCY

(Filed March 13, 1978)

Upon consideration of the petition and brief in support thereof of the Metropolitan Development and Housing Agency; the reply briefs of South Central Bell Telephone Company, Metropolitan Government of Nashville and Davidson County, Tennessee, acting by and through the Electric Power Board of said Government; Nashville Gas Company; Colonial Pipeline Company; and The Western Union Telegraph Company, the Opinion of the Court of Appeals and the record in the cause,

Finding no error in the Court of Appeals the writ is denied at the cost of petitioner.

Per Curiam.

ORDINANCE NO. 155

FRANCHISE OF NASHVILLE GAS AND HEATING COMPANY

SECTION 1. BE IT ENACTED BY THE MAYOR AND CITY COUNCIL OF NASHVILLE, That the consent of the Mayor and City Council of Nashville is hereby given to the acquisition, by purchase, lease, or other lawful contract, by the Nashville Gas & Heating Company, of all or any part of the property of the Nashville Gas Company; and permission and consent are hereby given to the alienation, transfer and disposition by the Nashville Gas Company, by sale, lease, or other lawful contracts, of its property, or any part thereof, to the

Nashville Gas & Heating Company; and permission and consent are hereby given to the Nashville Gas Company to surrender to the Mayor and City Council of Nashville the grant or license by said Mayor and City Council to said Nashville Gas Company, approved February 20, 1900, and ratified at a special election of the qualified voters of the City of Nashville, held April 19, 1900.

SEC. 2. That the Nashville Gas & Heating Company be, and is, hereby granted a license for forty (40) years from and after the date that this ordinance shall be approved by the people, as provided by law, and it is hereby authorized to construct, acquire, maintain and operate gas works in the City of Nashville, County of Davidson, State of Tennessee, and to manufacture, sell and supply gas in said city, and to buy, use and maintain pipes and extend existing conduits and mains, with all the necessary and proper attachments, connections and appurtenances below the surface of the streets, avenues, sidewalks, alleys and public grounds, and on the bridges and viaducts of the city of Nashville, as the boundaries thereof are now and may hereafter be, for the supply and distribution of gas, and for the same purpose to erect and maintain therein all necessary posts for lamps and lanterns, and to make connections for customers with such pipes and main, for the term of forty years aforesaid; PROVIDED, that all pavements, macadam and sidewalks shall be taken up, and all excavations in said streets, avenues, sidewalks, alleys and public grounds shall be under the supervision of the Board of Public Works; PROVIDED, FURTHER, that said pavements, macadam and excavations shall be replaced and repaired with like material, and left in as good condition as before. Where said company tears up a macadam street for laying and extending pipes for services, or for repairing the same, they shall in refilling such excavations made, thoroughly tamp each six-inch layer of material used, but the top layer shall, in every instance, be new, clean macadam, filled to a depth of not less than ten inches. If, in re-

storing a brick or granite street, any of the material is damaged, said company shall furnish new brick or granite, as the case may be, in order to restore said street to a condition equal to that before disturbed. In every instance shall this work be done to the satisfaction of the Board of Public Works. Should said Nashville Gas & Heating Company refuse or fail to replace said pavements, macadam, sidewalks and excavations within a reasonable time, which shall be determined by the Board of Public Works, then the same may be replaced and restored by the City, under the direction of the Board of Public Works, at the cost and expense of said grantee. Before any excavations are made by said Nashville Gas & Heating Company, at any time for extension in any street or alley, for any of the purposes named in this ordinance, it shall be the duty of said Company to apply for a permit therefor from the proper officers of said city, which permit shall state the particular street or alley where said work is to be done, and the length of time allowed in which said work shall be completed.

SEC. 3. That said company shall not open or incumber at any one time more of any street, avenue, sidewalk, alley or public highway or place, than may be necessary in order to enable it to proceed with advantage in laying and repairing of mains and pipes, nor shall it permit any such street, avenue, alley or public highway so opened or incumbered by it to remain open and incumbered for a longer period of time than shall be necessary, which time shall be determined by the Board of Public Works. In all cases where any street, alleys, sidewalk or public place shall be incumbered or excavated by said company, they shall take all precaution for the protection of the public usual under such circumstances, and such as may now or hereafter be required by the general ordinances of the city, and shall hold the city harmless for any damages to persons or property caused by the fault or neglect of said Nashville Gas & Heating Company. Whenever the city shall grade or regrade a street, alley, or public highway along or across which said

company has constructed any pipes or mains, it shall be the duty of said company, at its own expense, to change said pipes or mains so as to conform to the streets, alleys or public highways to be graded or regraded on on order therefor from the proper officers of said city.

SEC. 4. No person, company or corporation shall be permitted to make any connections with any of the distributing pipes or service pipes of said company unless duly authorized by it.

SEC. 5. In case of making repairs or constructing new work the said company shall have the right to shut off the gas, and keep the same shut off for such time as may be necessary to accomplish the purpose.

SEC. 6. Said company shall have the right to shut off the gas from any consumer who may be in arrears for a longer period than fifteen days.

SEC. 7. In constructing, repairing and operating said works, said company shall use every reasonable and proper precaution to avoid damage and injury to persons and property, and shall, at all times and in all places, hold and save harmless the said city from all and every such damage, injury, loss or expense caused or occasioned by reason of any act or failure to act of said company, in the construction, repairing or operation of said gas works or any part thereof, or in paving or repaving of any streets by reason of any acts done by said company.

SEC. 8. Under the permission and authority hereby granted, said company shall manufacture, furnish and sell to the City of Nashville, and to the citizens thereof, a good commercial gas, suitable for illuminating purposes, and for fuel purposes, and shall establish and maintain such manufacturing plant and conduits, mains and pipes as are necessary to provide an adequate supply of gas to all of its consumers, including the City of Nashville, which, shall, burning five cubic feet per hour, in any

ordinary lava tip open flame burner in common use, be capable of producing a light equal to sixteen standard sperm candles, as near as practicable, but never less than fifteen candle power, and suitable for illuminating purpose, and give an average heating value of 600, and never less than 550 British thermal units per cubic foot of gas, suitable for heating and commercial purposes. The right, at any time, to test the candle power of gas to be furnished by said company, or the accuracy of the meters used in measuring the same, is reserved to the Mayor and City Council on complaint of any consumer that the gas furnished him is not up to the standard, then the Mayor shall be compelled to have proper test made, the expense of which is to be paid by the Nashville Gas & Heating Company, the said Nashville Gas & Heating Company shall, within a reasonable time after notification by the proper city authorities, correct any deficiency in the candle or heating power of the gas or the accuracy of any meter used, and an intentional failure on the part of said company, within a reasonable time after notification by the proper city authorities, to correct any deficiency in the candle power or heating power of the gas, or the accuracy of any meter used, shall be a sufficient cause for the revocation of this license by the Mayor and City Council, unless explanation satisfactory to the Mayor and City Council shall be made. The rate to be charged by said company for gas may equal, but shall not exceed, $1.10 per 1,000 cubic feet, with 10 cents per 1,000 cubic feet discount if bills are paid in the first five business days next following the date bills are rendered. Said Company may make a minimum charge for gas of 15 cents to each consumer or person having a meter of said company installed in any month in which said consumer or person having a meter of said company installed shall use less than 150 cubic feet of gas. No charge shall be made by said company for the rent of any meter.

SEC. 9. At stated intervals or period of ten years, commencing ten years after the date of the acceptance of this ordi-

nance by the Nashville Gas & Heating Company, as hereinafter provided in Section 10 of this ordinance, the price at which gas shall be sold by said Nashville Gas & Heating Company shall be subject to regulation or adjustment between said Nashville Gas & Heating Company, and said Mayor and City Council of Nashville, by arbitration, and the price charged for gas during the next ensuing ten years, after each arbitration, any equal, but shall not exceed, the rate fixed by the arbitrators, which rate shall be determined by considering all conditions entering into the cost of producing and distributing gas, and the value and sale of by-products, by said Nashville Gas & Heating Company, and the price to be so periodically fixed by the arbitrators shall bear the same relation or proportion to the then cost of materials, production and distribution of gas, and the value and sale of by-products as shall obtain with said Nashville Gas & Heating Company averaged over a period of not less than two years of the ten years preceding the period of arbitration; PROVIDED, that at no time shall the price charged for gas be greater than $1.10 per 1,000 cubic feet, subject to the discount hereinbefore provided in Section 8 of this ordinance. The arbitration herein provided for shall be by arbitrators appointed, one by the Mayor and City Council of Nashville, and one by the Nashville Gas & Heating Company, and in the event of disagreement between them, the two so chosen shall select a third disinterested person, who shall, together with said two, consider and decide the matter, and the decision of said arbitrators, or a majority of same, shall be conclusive and binding upon said Nashville Gas & Heating Company and said Mayor and City Council of Nashville.

SEC. 10. That within ten days after the approval of this ordinance said company shall, by its legally constituted representatives, file with the Recorder of the city a written acceptance of this grant, with all of its terms, limitations and requirements, and a failure so to accept the same within said time shall of itself work a revocation of this grant.

SEC. 11. That in event of the acceptance of this ordinance by the Nashville Gas & Heating Company, as herein before provided in Section 10, then this ordinance shall be submitted to the qualified voters of the City of Nashville at a special election to be held on the fifteenth day of April, 1912, subject to the provisions of the law governing such elections. All those voters favoring the ordinance shall vote "for the Nashville Gas & Heating Company ordinance", and those voting against said ordinance shall vote "against the proposed Nashville Gas & Heating Company ordinance," and the returns of said election shall be canvassed and declared, as now provided by law.

SEC. 12. That in event a majority of the qualified voters of the city voting on the proposition herein directed to be submitted shall vote for the adoption of this ordinance, then the Nashville Gas & Heating Company, in consideration of the rights and licenses hereby granted to said company, shall pay to the Mayor and City Council of Nashville the full sum of one hundred thousand ($100,000) dollars, and said payment shall be made by said Nashville Gas & Heating Company within ten days after said election, and it shall not exercise any of the licenses and privileges hereby granted until said payment shall have been made. PROVIDED, that nothing in this ordinance shall be construed as exempting said Nashville Gas & Heating Company from the payment of any taxes lawfully imposed by the Mayor and City Council of Nashville.

SEC. 13. That in event a majority of the qualified voters of the city, voting on the proposition herein directed to be submitted, shall vote for the adoption of this ordinance, and said Nashville Gas & Heating Company shall make the payment required to be made as hereinbefore provided in Section 12, then the Board of Public Works is hereby authorized and directed to carry out the terms and provisions hereof.

SEC. 14. That in consideration of the rights and licenses hereby granted to the Nashville Gas & Heating Company, and in

addition to the payment required to be made as hereinbefore provided in Section 12, said company shall pay to the Mayor and City Council of Nashville five (5) per centum of its gross receipts from the sale of gas, and also from the sale, at a fair market value, of by-products, unless and until said Mayor and City Council of Nashville—and the voters of the city at an election held for such purpose, according to the provisions of the law, shall ratify such, grant a license or right to any other company to engage in the same or a similar business to that of the Nashville Gas & Heating Company, and such other companies shall actually engage in business or the city itself engage in such business, at which time all payments provided for in this section shall cease; PROVIDED, that nothing herein contained shall be construed to prevent the city from granting a license or right to a natural gas company. Said sum is to be paid half-yearly, and said Nashville Gas & Heating Company shall furnish to the proper representative of the city a sworn statement of its proper officer, showing the production of gas, coke, tar and ammonia, and other facts connected with the production, upon which said payment is made; and said Mayor and City Council of Nashville shall have the right, through its proper officers, or agents, to examine and verify such of the records, books and accounts of the Nashville Gas & Heating Company as may be necessary to enable said city to obtain the true amount of said gross receipts.

SEC. 15. At any time thirty years after the approval of this grant by the Mayor and City Council of Nashville, upon giving twelve months' notice to said Nashville Gas & Heating Company, its successors and assigns, of its intention to do so, may elect to purchase the plant constructed or acquired by said company, embracing every appliance thereof, for the manufacture and furnishing of gas for lighting and heating. And it shall have the right to do so at a fair valuation, to be arrived at by arbitration, each party hereto choosing representatives, and these

a third disinterested party. But in arriving at the valuation of said plant. including all appliances as aforesaid, it is expressly contracted and agreed by said Nashville Gas & Heating Company, that the sale shall be taken and construed as a voluntary surrender by said company, its successors and assigns, of the grant or franchise hereby given, and the same shall not be valued, but the arbitrators shall value the plant and the appliances aforesaid as a plant in actual operation, the right to immediate operation of which will vest upon the completion of the sale, exclusively in the Mayor and City Council of Nashville, the property to be valued at its actual value at the time of arbitration.

SEC. 16. Said Nashville Gas & Heating Company, intending the substantial betterment and extension of the plant of the Nashville Gas Company, in the event of the acquisition of same by said Nashville Gas & Heating Company, under the terms and provisions of this grant, agrees to expend within five years next succeeding the acceptance hereof by said Nashville Gas & Heating Company, for such betterment and extension, a sum not less than five hundred thousand ($500,000) dollars; and said company further agrees that the expenditure by it of such sum for such purpose shall be a part of the consideration of this grant made by this ordinance.

SEC. 17. No convict labor shall be used by said company or any person, company or corporation working for it in any part of its work, nor shall said company use any material that is the product of convict labor.

SEC. 18. That, hereafter, whenever the city paves with granite, brick, asphalt or other permanent material, any street in the city in which the company has its mains, it shall be the duty of said company, before said work is done, to run in service pipes from its main pipes to the sidewalk of each and every lot, no matter whether such lot is vacant or improved.

SEC. 19. That nothing in this ordinance shall be construed as a waiver to the city's rights, at any time, to erect and operate a gas plant.

SEC. 20. A failure on the part of said company to comply with the provisions of this ordinance, or failure to comply with an order or request of the Board of Public Works issued thereunder, shall subject said company to a fine of not less than $10 nor more than $50 for each offense; PROVIDED, HOWEVER, that this section shall not be construed to conflict with any penalty otherwise provided herein.

SEC. 21. That this ordinance shall take effect from and after its passage, the welfare of the city requiring it.

Approved October 10, 1911.

H. E. HOWSE, Mayor

To the Mayor and City Council of
Nashville, Tennessee:

The Nashville Gas & Heating Company hereby accepts the grant mde to it by Ordinance No. 155 of the Mayor and City Council of Nashville, passed October 9, 1911, and approved by the Mayor October 10, 1911, with all of its terms, limitations and requirements.

Done in pursuance of a resolution duly passed by the Board of Directors of the Nashville Gas & Heating Company October 10, 1911.

This the 10th day of October, 1911.

NASHVILLE GAS & HEATING COMPANY
By J. H. FALL, President

C. H. BRANDON, Secretary

Filed in the office of the Recorder of the Mayor and City Council of Nashville, Tennessee, this October 10th, 1911.

W. L. MURREY, City Recorder

Renewed by referendum of the people on April 24, 1950 for a period of Thirty (30) Years.

EXHIBIT D

CHAPTER III

CUMBERLAND TELEPHONE AND TELEGRAPH COMPANY

Section

1. Right to erect poles, wires, etc.
2. Right, title, and interest confirmed.
3. To remove or replace poles, wires, etc., when.
4. Further extension of plant.
5. Cutting or removing wires, when; fire alarm wires.
6. City tax.
7. Bond to indemnify the city against loss.
8. Failure a misdemeanor; fine.
9. Acceptance of grant.
10. Ordinance to take effect.

SECTION 1. *Be it enacted by the Mayor and City Council of Nashville,* That the Cumberland Telephone and Telegraph Company be, and is hereby, granted the right to erect and maintain in operation telegraph poles, cables, and wires over the various

streets, alleys and squares of the city, and cables and wires over the Cumberland River Bridge, for the purpose of transmitting messages by telephone.

SEC. 2. *Be it further enacted,* That all the right, title, and interest of said company in and to its plant now in operation in the city, including cables, wires, poles, cross-arms, boxes, switch-boards, etc., heretofore erected and operated under permission of the Mayor and City Council heretofore informally granted, be now recognized and confirmed to said company, and allowed to stand and be operated, but expressly subject to the regulations, limitations, requirements and restrictions now hereinbelow imposed.

SEC. 3. *Be it further enacted,* That if any of the cables, wires, and poles now erected and in operation, are so located as, in the judgment of the Board of Public Works and Affairs, to injuriously affect the welfare of the city, or any of the citizens thereof, then, after five day's written notice from said Board of Public Works and Affairs, said company shall cause said objectionable cable, wires, and poles to be removed, or, at the election or demand of said Board so placed as to render them, in the judgment of said Board, free from objection.

SEC. 4. *Be it further enacted,* That the further extension of the plant, cables, wires, cross-arms, and other property in direct connection therewith, of said company, be, and is hereby, placed under the direct supervision and control of said Board of Public Works and Affairs; and before and as the system is desired or intended by said company to be extended, said company shall serve on said Board a written notice, stating in particular what extension or change is contemplated, where it is proposed to run the wires, place the poles and cross-arms, height and size of poles, number and length of cross-arms, etc., and the written assent of said Board obtained to said extension as proposed.

SEC. 5. *Be it further enacted*, That there shall exist on the part of the city of Nashville the right to cut the wires of said company, when, in the judgment of the Chief of the Fire Department, said cutting is rendered necessary for the proper protection of property from fire, without any consequent liability on the part of the city to said company for the damage thus inflicted; also the right to have said company, on three days' notice, temporarily remove its wires or poles, when, in the judgment of the Board of Public Works and Affairs, said removal may be required in the erection of buildings, or for other reasonable cause; also the right, without compensation to said company, to have remain or hereafter placed on said company's poles, without injury to its property, the wires for the maintenance of the city's fire alarm system.

SEC. 6. *Be it further enacted*, That the said Telephone and Telegraph Company shall pay directly to the City Comptroller, each year, in lieu of all other taxes except water tax, one dollar on each and every box actually in use, said tax to be paid quarterly.

SEC. 7. *Be it further enacted*, That said company shall give a bond, to be approved by the Board of Public Works and Affairs, in the sum of twenty-five thousand ($25,000) dollars, to indemnify the city against any loss in any event, and this bond shall be renewed as often as the Board of Public Works and Affairs may demand; and in the event a joint judgment is given by any court against said company and the city, it is expressly agreed and contracted that said company shall not plead that it and said city were joint wrong-doers, and that it is not liable on said bond.

SEC. 8. *Be it further enacted*, That a failure on the part of said company to obey any one of the requirements of this ordinance as hereinabove set forth, shall constitute, and is hereby declared to be, a misdemeanor, and shall subject said company to a fine of ten dollars for each offense and for each day of

continuance thereafter, to be recovered before the Judge of the City Court.

SEC. 9. *Be it further enacted*, That this ordinance shall be null and void and of no effect at the expiration of sixty days from the date it shall become a law, unless the said Cumberland Telephone and Telegraph Company file, within sixty days, with the Recorder its acceptance hereof and agreement hereto in writing, which acceptance shall be in form and substance as that contained on page 304 of the Laws of Nashville, 1888, which shall be prepared by the Board of Public Works and Affairs and City Attorney.

SEC. 10. *Be it further enacted*, That this ordinance take effect from and after its passage, the welfare of the city requiring it.

Approved October 16, 1888.

Acceptance

At a regular meeting of the Board of Directors of the Cumberland Telephone and Telegraph Company, held on Wednesday, the twenty-fourth of October, 1888, at the office of the company in the city of Nashville, Tenn., the following proceedings were had, to wit:

"The following resolutions were offered by Mr. Jos. H. Thompson, and, on motion made by him, were duly adopted by the Board of Directors:

"WHEREAS, By an ordinance of the city of Nashville, passed on the eleventh day of October, 1888, the right and privilege were granted by the Mayor and City Council of Nashville, to this company, to erect and maintain in operation telegraph poles, cables, and wires over various streets, alleys and squares of the city, and the cables and wires over the Cumberland River

bridge, for the purpose of transmitting message by telephone, upon certain conditions set out in said ordinance; and,

"WHEREAS, The ninth section of said ordinance requires this company to accept said ordinance and to comply with all the pro-various (sic) streets, alleys and squares of the city, and cables and wires and to refrain from doing all things prohibited therein, all by a resolution to be passed by the Board of Directors of this company, and a copy of such resolutions, duly certified to be such by the President of this company, to be filed with the Mayor of said city, on or before the eleventh day of December, 1888; therefore,

"*Be it resolved by the Board of Directors*, That the Cumberland Telephone and Telegraph Company does hereby accept said ordinance and does accept and agree to comply with all the provisions and conditions thereof pertaining to it; to perform all things it is required by said ordinance to do, and to refrain from doing those things it is prohibited from doing.

"*Bt it further resolved*, That a copy of these resolutions, duly certified to be such by the President of the company, be filed by said officer with the Mayor of the city, on or before the eleventh day of December, 1888."

I, W. M. Duncan, President of the Cumberland Telephone and Telegraph Company, do hereby certify that the foregoing is a true and correct copy of the resolutions adopted by the Board of Directors of said company, at a regular meeting of said Board held on the twenty-fourth day of October, 1888, at the office of the company, in the city of Nashville, Tennessee, and duly entered upon the minute book of the Board. This the twenty-fourth day of October, 1888.

W. M. DUNCAN,
President of Cumberland Telephone and Telegraph Company.

I hereby certify that the resolution was filed with me on or before the twenty-fifth day of October, 1888, by W. M. Duncan, as President of the Cumberland Telephone and Telegraph Company.

C. P. MCCARVER, *Mayor of Nashville.*

EXHIBIT E

SEC. 17. That nothing in this ordinance shall be construed as a waiver to the city's rights, at any time, to erect and operate a gas plant.

SEC. 18. A failure on the part of said company to comply with the provisions of this bill, or failure to comply with an order or request the Board of Public Works issued thereunder, shall subject said company to a fine of not less than ten dollars nor more than fifty dollars for each offense; *Provided, however*, That this section shall not be construed to conflict with any penalty otherwise provided herein.

SEC. 19. That this ordinance shall take effect from and after its passage, the welfare of the city requiring it.

J. M. HEAD, *Mayor*

Approved February 20, 1900.

Acceptance

To the Mayor and City Council of Nashville:

The Nashville Gas Company hereby accepts the grant made to it by the ordinance approved by the Mayor February 20, 1900, with all its terms, limitations and requirements. Done, in pur-

suance of a resolution passed by the Board of Directors February 27, 1900.

This 28th day of February, 1900.

THE NASHVILLE GAS COMPANY
By THOS. H. MALONE, *President*

H. L. SPERRY, *Secretary*

I hereby certify that the foregoing acceptance by the Nashville Gas Company was filed with the undersigned, February 28, 1900.

J. P. BYRNE, *Recorder.*

Report of Commissioners of Registration

We, the undersigned Commissioners of Registration in and for Davidson County, hereby certify that a special election held in the city of Nashville, Tennessee, on the 19th day of April, 1900, on the proposition to grant a franchise to the Nashville Gas Company, there were cast by the legal and qualified voters of Nashville at said election one thousand four hundred and two votes, of which one thousand three hundred and one of said votes were cast in favor of granting were cast against granting same.

This 26th day of April, 1900.

(Signed) R. R. CARMACK
LEE BROCK
J. H. REEVES
Commissioners of Registration for Davidson County, Tenn.

B

NASHVILLE GAS AND HEATING COMPANY

Section.

1. Right to acquire Nashville Gas Company.
2. Terms and conditions.
3. Excavations; save city from damages
4. Permits to open streets.
5. Gas shut off, when.
6. Consumer must pay.
7. City fully protected.
8. Quality of gas 16 candle.
9. Price of gas regulated.
10. Grant accepted in ten days.
11. Referendum.
12. Bonus of $100,000.
13. Board of Public Works.
14. Gross five per cent to city.
15. Right to buy in thirty years.
16. Must put in $500,000.
17. No convict labor.
18. Pipes to every lot.
19. City can operate.
20. Penalty.

SECTION 1. *Be it enacted by the Mayor and City Council of Nashville*, That the consent of the Mayor and City Council of

Nashville is hereby given to the acquisition, by purchase, lease, or other lawful contract, by the Nashville Gas & Heating Company, of all or any part of the property of the Nashville Gas Company; and permission and consent are hereby given to the alienation, transfer and disposition by the Nashville Gas Company, by sale, lease, or other lawful contracts, of its property, or any part thereof, to the Nashville Gas & Heating Company; and permission and consent are hereby given to the Nashville Gas Company to surrender to the Mayor and City Council of Nashville the grant or license by said Mayor and City Council to said Nashville Gas Company, approved February 20, 1900, and ratified at a special election of the qualified voters of the City of Nashville, held April 19, 1900.

SEC. 2. That the Nashville Gas & Heating Company be, and is, hereby granted a license for forty (40) years from and after the date that this ordinance shall be approved by the people, as provided by law, and it is hereby authorized to construct, acquire, maintain and operate gas works in the city of Nashville, county of Davidson, State of Tennessee, and to manufacture, sell and supply gas in said city, and to buy, use and maintain pipes and extend existing conduits and mains, with all the necessary and proper attachments, connections and appurtenances below the surface of the streets, avenues, sidewalks, alleys and public grounds, and on the bridges and viaducts of the city of Nashville, as the boundaries thereof are now and may hereafter be, for the supply and distribution of gas, and for the same purpose to erect and maintain therein all necessary posts for lamps and lanterns, and to make connections for customers with such pipes and mains, for the term of forty years aforesaid; *Provided,* that all pavements, macadam and sidewalks shall be taken up, and all excavations in said streets, avenues, sidewalks, alleys and public grounds shall be under the supervision of the Board of Public Works; *Provided, further,* that said pavements, macadam and excavations shall be replaced and repaired with like material, and left in as good condition as before.

Where said company tears up a macadam street for laying and extending pipes for services, or for repairing the same, they shall in refilling such excavations made, thoroughly tamp each six-inch layer of material used, but the top layer shall, in every instance, be new, clean macadam, filled to a depth of not less than ten inches. If, in restoring a brick or granite street, any of the material is damaged, said company shall furnish new brick or granite, as the case may be, in order to restore said street to a condition equal to that before disturbed. In every instance shall this work be done to the satisfaction of the Board of Public Works. Should said Nashville Gas & Heating Company refuse or fail to replace said pavements, macadam, sidewalks and excavations within a reasonable time, which shall be determined by the Board of Public Works, then the same may be replaced and restored by the City, under the direction of the Board of Public Works, at the cost and expense of said grantee. Before any excavations are made by said Nashville Gas & Heating Company, at any time for extension in any street or alley, for any of the purposes named in this ordinance, it shall be the duty of said Company to apply for a permit therefor from the proper officers of said city, which permit shall state the particular street or alley where said work is to be done, and the length of time allowed in which said work shall be completed.

SEC. 3. That said company shall not open or incumber at any one time more of any street, avenue, sidewalk, alley or public highway or place, than may be necessary in order to enable it to proceed with advantage in laying and repairing of mains and pipes, nor shall it permit any such street, avenue, alley or public highway so opened or incumbered by it to remain open and incumbered for a longer period of time than shall be necessary, which time shall be determined by the Board of Public Works. In all cases where any street, alley, sidewalk or public place shall be incumbered or excavated by said company, they shall take all precaution for the protection of the public usual under such

circumstances, and such as may now or hereafter be required by the general ordinances of the city, and shall hold the city harmless for any damages to persons or property caused by the fault or neglect of said Nashville Gas & Heating Company. Whenever the city shall grade or regrade a street, alley, or public highway along or across which said company has constructed any pipes or mains, it shall be the duty of said company, at its own expense, to change said pipes or mains so as to conform to the streets, alleys or public highways to be graded or regraded on an order therefor from the proper officers of said city.

SEC. 4. No person, company or corporation shall be permitted to make any connections with any of the distributing pipes or service pipes of said company unless duly authorized by it.

SEC. 5. In case of making repairs or constructing new work, the said company shall have the right to shut off the gas, and keep the same shut off for such time as may be necessary to accomplish the purpose.

SEC. 6. Said company shall have the right to shut off the gas from any consumer who may be in arrears for a longer period than fifteen days.

SEC. 7. In constructing, repairing and operating said works, said company shall use every reasonable and proper precaution to avoid damage and injury to persons and property, and shall, at all times and in all places, hold and save harmless the said city from all and every such damage, injury, loss or expense caused or occasioned by reason of any act or failure to act of said company, in the construction, repairing or operation of said gas works or any part thereof, or in paving or repaving of any streets by reason of any acts done by said company.

SEC. 8. Under the permission and authority hereby granted, said company shall manufacture, furnish and sell to the city of

Nashville, and to the citizens thereof, a good commercial gas, suitable for illuminating purposes, and for fuel purposes, and shall establish and maintain such manufacturing plant and conduits, mains and pipes as are including the City of Nashville, which shall, burning five cubic feet per hour, in any ordinary lava tip open flame burner in common use, be capable of producing a light equal to sixteen standard sperm candles, as near as practicable, but never less than fifteen candle power, and suitable for illuminating purpose, and give an average heating value of 600, and never less than 550 British thermal units per cubic foot of gas, suitable for heating and commercial purposes. The right, at any time, to test the candle power of gas to be furnished by said company, or the accuracy of the meters used in measuring the same, is reserved to the Mayor and City Council on complaint of any consumer that the gas furnished him is not up to the standard, then the Mayor shall be compelled to have proper test made, the expense of which is to be paid by the Nashville Gas & Heating Company, the said Nashville Gas & Heating Company shall, within a reasonable time after notification by the proper city authorities, correct any deficiency in the candle or heating power of the gas or the accuracy of any meter used, and an intentional failure on the part of said company, within a reasonable time after notification by the proper city authorities, to correct any deficiency in the candle power or heating power of the gas, or the accuracy of any meter used, shall be a sufficient cause for the revocation of this license by the Mayor and City Council, unless explanation satisfactory to the Mayor and City Council shall be made. The rate to be charged by said company for gas may equal, but shall not exceed, $1.10 per 1,000 cubic feet, with 10 cents per 1,000 cubic feet discount if bills are paid in the first five business days next following the date bills are rendered. Said Company may make a minimum charge for gas of 15 cents to each consumer or person having a meter of said company installed in any month in which said consumer or person having a meter of said company installed

shall use less than 150 cubic feet of gas. No charge shall be made by said company for the rent of any meter.

SEC. 9. At stated intervals or period of ten years, commencing ten years after the date of the acceptance of this ordinance by the Nashville Gas & Heating Company, as hereinafter provided in Section 10 of this ordinance, the price at which gas shall be sold by said Nashville Gas & Heating Company shall be subject to regulation or adjustment between said Nashville Gas & Heating Company, and said Mayor and City Council of Nashville, by arbitration, and the price charged for gas during the next ensuing ten years, after each arbitra- * * * which rate shall be determined by considering all conditions entering into the cost of producing and distributing gas, and the value and sale of by-products, by said Nashville Gas & Heating Company, and the price to be so periodically fixed by the arbitrators shall bear the same relation or proportion to the then cost of materials, production and distribution of gas, and the value and sale of by-products as shall obtain with said Nashville Gas & Heating Company averaged over a a period of not less than two years of the ten years preceding the period of arbitration; *Provided,* that at no time shall the price charged for gas be greater than $1.10 per 1,000 cubic feet, subject to the discount hereinbefore provided in Section 8 of this ordinance. The arbitration herein provided for shall be by arbitrators appointed, one by the Mayor and City Council of Nashville, and one by the Nashville Gas & Heating Company, and in the event of disagreement between them, the two so chosen shall select a third disinterested person, who shall, together with said two, consider and decide the matter, and the decision of said arbitrators, or a majority of same, shall be conclusive and binding upon said Nashville Gas & Heating Company and said Mayor and City Council of Nashville.

SEC. 10. That within ten days after the approval of this ordinance said company shall, by its legally constituted representatives, file with the Recorder of the city a written accetpance of

this grant, with all of its terms, limitations and requirements, and a failure so to accept the same within said time shall of itself work a revocation of this grant.

SEC. 11. That in event of the acceptance of this ordinance by the Nashville Gas & Heating Company, as herein before provided in Section 10, then this ordinance shall be submitted to the qualified voters of the city of Nashville at a special election to be held on the fifteenth day of April, 1912, subject to the provisions of the law governing such elections. All those voters favoring the ordinance shall vote "for the Nashville Gas & Heating Company ordinance," and those voting against said ordinance shall vote "against the proposed Nashville Gas & Heating Company ordinance," and the returns of said election shall be canvassed and declared, as now provided by law.

SEC. 12. That in event a majority of the qualified voters of the city voting on the proposition herein directed to be submitted, shall vote for the adoption of this ordinance, then the Nashville Gas & Heating Company, in consideration of the rights and licenses hereby granted to said company, shall pay to the Mayor and City Council of Nashville the full sum of one hundred thousand ($100,000) dollars, and said payment shall be made by said Nashville Gas & Heating Company within ten days after said election, and it shall not exercise any of the licenses and privileges hereby granted until said payment shall have been made. *Provided*, that nothing in this ordinance shall be construed as exempting said Nashville Gas & Heating Company from the payment of any taxes lawfully imposed by the Mayor and City Council of Nashville.

SEC. 13. That in event a majority of the qualified voters of the city, voting on the proposition herein directed to be submitted, shall vote for the adoption of this ordinance, and said Nashville Gas & Heating Company shall make the payment required to be made as hereinbefore provided in Section 12, then the Board of

Public Works is hereby authorized and directed to carry out the terms and provisions hereof.

SEC. 14. That in consideration of the rights and licenses hereby granted to the Nashville Gas & Heating Company, and in addition to the payment required to be made as hereinbefore provided in Section 12, said company shall pay to the Mayor and City Council of Nashville five (5) per centum of its gross receipts from the sale of gas, and also from the sale, at a fair market value, of by-products, unless and until said Mayor and City Council of Nashville—and the voters of the city at an election held for such purpose, according to the provisions of the law, shall ratify such, grant a license or right to any other company to engage in the same or a similar business to that of the Nashville Gas & Heating Company, and such other companies shall actually engage in business or the city itself engage in such business, at which time all payments provided for in this section shall cease; *Provided*, that nothing herein contained shall be construed to prevent the city from granting a license or right to a natural gas company. Said sum is to be paid half-yearly, and said Nashville Gas & Heating Company shall furnish to the proper representative of the city a sworn statement of its proper officer, showing the production of gas, coke, tar and ammonia, and other facts connected with the production, upon which said payment is made; and said Mayor and City Council of Nashville shall have the right, through its proper officers, or agents, to examine and verify such of the records, books and accounts of the Nashville Gas & Heating Company as may be necessary to enable said city to obtain the true amount of said gross receipts.

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by the Mayor and City Council of Nashville, upon giving twelve months' notice to said Nashville Gas & Heating Company, its successors and assigns, of its intention to do so, may elect to purchase the plant constructed or acquired by said company, embracing every appliance thereof, for the manufacture and furnishing of gas for lighting and heating. And it shall have the right to do so at a fair valuation, to be arrived at by arbitration, each party hereto choosing representatives, and these a third disinterested party. But in arriving at the valuation of said plant, including all appliances as aforesaid, it is expressly contracted and agreed by said Nashville Gas & Heating Company, that the sale shall be taken and construed as a voluntary surrender by said company, its successors and assigns, of the grant or franchise hereby given, and the same shall not be valued, but the arbitrators shall value the plant and the appliances aforesaid as a plant in actual operation, the right to immediate operation of which will vest upon the completion of the sale, exclusively in the Mayor and City Council of Nashville, the property to be valued at its actual value at the time of arbitration.

SEC. 16. Said Nashville Gas & Heating Company, intending the substantial betterment and extension of the plant of the Nashville Gas Company, in event of the acquisition of same by said Nashville Gas & Heating Company, under the terms and provisions of this grant, agrees to expend within five years next succeeding the acceptance hereof by said Nashville Gas & Heating Company, for such betterment and extension, a sum not less than five hundred thousand ($500,000) dollars; and said company further agrees that the expenditure by it of such sum for such purpose shall be a part of the consideration of this grant made by this ordinance.

SEC. 17. No convict labor shall be used by said company or any person, company or corporation working for it in any part of its work, nor shall said company use any material that is the product of convict labor.

SEC. 18. That, hereafter, whenever the city paves with granite, brick, asphalt or other permanent material, any street in the city in which the company has its mains, it shall be the duty of said

company, before said work is done, to run in service pipes from its main pipes to the sidewalk of each and every lot, no matter whether such lot is vacant or improved.

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waiver to the city's rights, at any time, to erect and operate a gas plant.

SEC. 20. A failure on the part of said company to comply with the provisions of this ordinance, or failure to comply with an order or request of the Board of Public Works issued thereunder, shall subject said company to a fine of not less than $10 nor more than $50 for each offense; *Provided, however,* that this section shall not be construed to conflict with any penalty otherwise provided herein.

SEC. 21. That this ordinance shall take effect from and after its passage, the welfare of the city requiring it.

Approved October 10, 1911.

H. E. HOWSE, *Mayor.*

To the Mayor and City Council of Nashville, Tennessee:

The Nashville Gas & Heating Company hereby accepts the grant made to it by Ordinance No. 155 of the Mayor and City Council of Nashville, passed October 9, 1911, and approved by the Mayor October 10, 1911, with all of its terms, limitations and requirements.

Done in pursuance of a resolution duly passed by the Board of Directors of the Nashville Gas & Heating Company October 10, 1911.

This the 10th day of October, 1911.

NASHVILLE GAS & HEATING COMPANY,
By J. H. FALL, *President.*

C. H. BRANDON, *Secretary.*

Filed in the office of the Recorder of the Mayor and City Council of Nashville, Tennessee, this October 10th, 1911.

W. L. MURREY, *City Recorder.*

EXHIBIT H

BILL NO. 72-252

An Ordinance Granting to the Colonial Pipeline Company, a Corporation Organized Under the Laws of the State of Delaware, the Right and Permission to Lay and Construct Its Pipeline, Not Exceeding Ten Inches in Diameter, Under, Along, and Across Streets, Alleys, Squares, Certain Fee Lands, and Highways Within the Jurisdiction of the Metropolitan Government of Nashville and Davidson County and Prescribing the Terms of Which the Same May Be Done.

WHEREAS, Colonial Pipeline Company desires to lay its pipe line through, under, across and along the streets, alleys, squares, highways and certain fee lands within the territorial jurisdiction of The Metropolitan Government of Nashville and Davidson County, commencing at the southeasterly boundary of The Metropolitan Government going north to a point near where the Tennessee Valley Authority transmission line enters the county parallel to the Murfreesboro Road and extending generally in a northwesterly direction across the territory of The Metropolitan Government of Nashville and Davidson County to a terminus point on property belonging to the Metropolitan Nashville Airport Authority where is will tie into the existing line located under authority of Ordinance No. 63-104; and

WHEREAS, said pipe line is to be used for the purpose of transporting petroleum products within the territory of The Metropolitan Government of Nashville and Davidson County;

BE IT ENACTED BY THE COUNCIL OF THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, AS FOLLOWS:

Section 1. That there is hereby granted unto the Colonial Pipeline Company, a corporation organized under the laws of the State of Delaware, its successors and assigns, the right, privilege and permission to lay and construct its pipe line, not to exceed ten inches in diameter, under, through, across and along the streets, alleys, squares, highways and certain fee lands within the territorial jurisdiction of The Metropolitan Government of Nashville and Davidson County, the route of said pipe line to be generally as follows:

> Beginning at the southeast corner of Davidson County approximately 0.2 of a mile south of the point where Carothers Road crosses the Davidson Co.-Rutherford Co. line; thence north to, and following, a line parallel to the Tennessee Valley Authority transmission line belonging to the Metropolitan Nashville Airport Authority where said line shall terminate in the line built under authority of Ordinance No. 63-104.

All as more particularly shown on Davidson County Property Maps 17, 22 and 26 attached to and made a part hereof, the crossings of fee lands being indicated in red.

Provided, however, that said permission is granted subject to the following terms and conditions:

(1) That the said Colonial Pipeline Company accept the provisions of this ordinance in writing within thirty days after its final passage and approval by the Mayor.

(2) That the details and specifications of the construction work in connection with the laying of said pipe line and the location and depth thereof and the details and specifications of the construction work in connection with the installation of said aforesaid pipe line shall be approved by the Metropolitan Mayor before construction is commenced.

(3) Colonial Pipeline Company further covenants, promises and agrees to fully indemnify, protect and save harmless The Metropolitan Government of Nashville and Davidson County from all liability and all claims, suits and actions of every name and description, for or on account of any damage or injury received or sustained by The Metropolitan Government or any other party from or by reason of the laying, maintenance, use, repair, renewal, replacement, relocation and removal of said pipe line, and in the restoration of said streets, roads, or lands, as herein provided, and further covenants, promises and agrees to be responsible for and pay all loss or damage to either person or property which may in any manner arise from or be caused by the construction, laying, maintenance, use, repair, removal, renewal or relocation of said pipe line, or any portion thereof, or in the restoration of the said streets, roads, or lands, as herein provided, and for which the said Metropolitan Government of Nashville and Davidson County is held responsible, and in the event of such loss or damage being sustained by The Metropolitan Government of Nashville and Davidson County to pay or cause to be paid to the said Metropolitan Government, upon demand, the amount of such loss or damage and all costs and expenses incidental thereto, and further that, before the construction and the laying of said pipe line is commenced within the territorial limits of the said Metropolitan Government of Nashville and Davidson County, said Colonial Pipeline Company shall furnish an indemnty bond in the amount of $20,000.00 to the Council of the Metropolitan Government of Nashville and Davidson County to insure that the damages to street, alley, and highway crossings will be repaired and main-

tained by Colonial Pipeline Company for a period of one year after installation.

(4) That the Colonial Pipeline Company will consult with the Metropolitan Mayor or his authorized representative so that a mutually agreeable solution may be arrived at with respect to any problems, not herein contemplated and which will affect the Metropolitan Government of Nashville and Davidson County, involved in the construction and operation of the aforesaid pipe line under, across, through and along the streets, alleys, squares, highways, and certain fee lands of the Metropolitan Government of Nashville and Davidson County.

(5) In the construction, maintenance, use, relocation and removal of the said pipe line, Colonial Pipeline Company agrees to comply with all laws, statutes and ordinances and the applicable rules, regulations methods, standards and practices of all governmental agencies now in effect or hereafter enacted or promulgated. The Metropolitan Mayor shall have the authority to require changes in the manner in which the pipeline is installed whenever he deems said changes necessary for the protection of the public. Any and all costs resulting from said changes shall be borne by the Colonial Pipeline Company.

(6) That, in all instances where the construction and laying of said pipe line shall in any way affect the conduits, wires, pipes or other installations of the Electric Power Board of the Metropolitan Government, the Metropolitan Department of Water and Sewerage Services, and the Metropolitan Department of Public Works, notice of such laying and construction of said pipe line shall be given to the appropriate department or board involved and construction shall not be done until satisfactory arrangements have been made with the appropriate department or board.

(7) No structure shall be placed on or erected in such manner as to be located on the surface of any street, alley, square, or

highway within the territorial limits of The Metropolitan Government of Nashville and Davidson County except vent pipes at the edge of the same where pipe line casings are required and road crossing markers as required under Paragraph No. (9) below.

(8) When such pipe line is within 1000 feet of any school, church, hospital, commercial or industrial establishment employing 100 or more people, or other places of private or public assembly where 100 or more people congregate and/or where such pipe line is constructed in congested urban areas designated as such by the Mayor, the type of pipe and other materials used in such pipe line through the lands aforesaid, and the factor of safety in connection therewith, shall conform to the A.P.I. specifications for products pipe lines passing through industrial and residential sections, and the following precautions against breaks and leakage will be taken by the Company; the wall thickness and grade of pipe shall be such that the operating pressure on the line is only 65% of the pressure at internal minimum yield of the pipe; radiographic equipment shall be used to check the quality of welds, besides visual inspection by qualified welding inspectors; all pipe installed in road crossings shall be air-tested prior to installation so that a third check may be made of all welds; all pipe shall be hydrostatically tested to 90% of its internal miniinum yield pressure, the pipe line shall be constructed with an external coating to protect the pipe from attack by corrosion and electrolysis; and the pipe line shall be protected by cathodic units to prevent electrolysis attack.

(9) Where such pipe line is constructed through or adjacent to a residental subdivision area or land which in the opinion of the Mayor will become residential subdivision land in the near future, road crossing markers will be installed at each crossing to mark and identify the pipe line so as to provide general protection to prevent its being ruptured or otherwise disturbed. Upon request of The Metropolitan Government, Colonial Pipeline Company will install such temporary mark-

ers as may be necessary to indicate the location of the pipe line through residential subdivision developments or where otherwise required for safety purposes.

(10) Whenever such pipe line is laid or constructed in any property owned by the Metropolitan Government of Nashville and Davidson County other than streets, alleys, or highway, or property used by the Metropolitan Board of Education, Colonial Pipeline Company shall pay to The Metropolitan Government for the right to traverse such property, Fifty Thousand ($50,000) Dollars for the privilege of using such property of The Metropolitan Government; provided, however, that said pipe line shall be relocated at the expense of the Colonial Pipeline Company when the space may be needed for the public use and purpose of the Metropolitan Government and provided that The Metropolitan Government of Nashville and Davidson County shall provide an alternate route for such pipe line at the nearest location available on property owned in fee by The Metropolitan Government of Nashville and Davidson County; it is specifically understood that the Metropolitan Government is not to be required to acquire by purchase or condemnation the property of others for such relocation purposes. It is understood that the width of the right-of-way to be granted for laying the pipe in the property owned by The Metropolitan Government of Nashville and Davidson County, other than streets, alleys, highways and certain fee lands shall be no more than fifteen (15) feet.

(11) For the right, privilege, and permission to lay and construct its pipe line, not to exceed ten inches in diameter, under, through, across and along streets, alleys, squares and highways within the territorial jurisdiction of The Metropolitan Government of Nashville and Davidson County the Colonial Pipeline Company shall pay to The Metropolitan Government of Nashville and Davidson County as an annual charge a sum equal to one cent per inch of diameter for each foot of pipe line in-

stalled under and along said streets, alleys, squares, and highways in the territorial limits of The Metropolitan Government of Nashville and Davidson County.

Wherever said pipe line is located in, under, through, across or along any street, alley, square or highway of The Metropolitan Government of Nashville and Davidson County, the same shall be relocated at the expense of the Colonial Pipeline Company when the space occupied by such pipe line may be needed for the public use and purposes of The Metropolitan Government, the State of Tennessee, or any other public authority.

Section 2. That the rights, privileges and permission granted to the Colonial Pipeline Company in this ordinance are granted pursuant to the terms and provisions of Tennessee Code Annotated Section 65-2801 (Supp. 1971).

Section 3. In the event any changes in the general location of the said pipe line become necessary, such changes in said pipe line and in the location and direction thereof shall be submitted to the Metropolitan Planning Commission for approval in accordance with the provisions of Section 11.505 of the Metropolitan Charter and also subject to the approval of the Metropolitan Mayor and upon his approval said pipe line may be laid over said route as thus changed.

Section 4. Upon completion of the construction of its pipe line within the Metropolitan Government's territorial limits, the Colonial Pipe Line Company shall file with the Metropolitan Clerk a sworn statement giving the exact footage of such pipe line within the area of the Metropolitan Government and the completed cost of such portion of the pipe line. The Colonial Pipe Line Company shall certify by affidavit to the Metropolitan Clerk any additions to, or subtractions from, that portion of the pipe line within the area of the Metropolitan

Government with a statement to the effect of such additions or subtractions on the value of the pipe line.

Section 5. Upon completion of the construction of its pipe line in the territory of the Metropolitan Government, the Colonial Pipe Line Company shall file with the Metropolitan Clerk detailed as-built drawings or maps showing the exact location and depth of the pipe line as constructed.

If additions or other changes are made in the location or depth, or the location and depth, of the said pipe line in the area of Nashville and Davidson County, the Colonial Pipe Line Company shall file with the Metropolitan Clerk detailed drawings showing the exact location and the depth of such additions or other changes, and the date on which such additions or other changes were completed.

Section 6. This Ordinance shall take effect from and after its passage, the welfare of The Metropolitan Government of Nashville and Davidson County requiring it.

INTRODUCED BY:

/s/ (Illegible)

.....

.....

Members of Council

I, being under oath, do certify this is a true and authentic copy of the Original Ordinance No. 72-252 of the Metropolitan Government of Nashville and Davidson County, Tennessee which passed third and final reading on 7/5/72, at the regular meeting of the Metropolitan Council held on that date, and is now recorded in Book No. 42, page 166.

Witness my hand and the Seal of the Metropolitan Government of Nashville and Davidson County, Tennessee, this 17th day of September, 1973.

/s/ RUTH JUDD
Metropolitan Clerk

State of Tennessee
County of Davidson

Sworn to and subscribed before me, by Ruth Judd, this 17 day of September, 1973.

PAUL E. WALTERS
Notary Public

My commission expires: 4/26/76.

AMENDMENT NO. 1 TO BILL NO. 72-252

Mr. President:

I move to amend Bill No. 72-252 by striking from Section 3 the figures "$20,000.00" as they appear in the 19th line on Page 3 of said bill, and inserting in lieu thereof the following figures:

$100,000.00

Introduced by:

RICHARD ADAMS /s/
Metropolitan Councilman

Adopted: June 20, 1972

AMENDMENT NO. 2 TO BILL NO. 72-252

Mr. President:

I move to amend Bill No. 72-252 by striking from the last line of Section 3 the words "one year" and inserting in lieu thereof the words:

"five years"

Introduced by:

RICHARD ADAMS /s/
Metropolitan Councilman

Adopted: June 20, 1972

METROPOLITAN COUNTY COUNCIL

Bill No. 72-252

AN ORDINANCE GRANTING TO THE COLONIAL PIPE-LINE COMPANY, A CORPORATION ORGANIZED UNDER THE LAWS OF THE STATE OF DELAWARE, THE RIGHT AND PERMISSION TO LAY AND CONSTRUCT ITS PIPELINE, NOT EXCEEDING TEN INCHES IN DIAMETER, UNDER, ALONG, AND ACROSS STREETS, ALLEYS, SQUARES, CERTAIN FEE LANDS, AND HIGHWAYS WITHIN THE JURISDICTION OF THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY AND PRESCRIBING THE TERMS OF WHICH THE SAME MAY BE DONE.

The within bill approved as to form and legality.

. . . . . .
Metropolitan Attorney.

Introduced June 6, 1972

Passed first Reading June 6, 1972

Referred to Public Works Committee

Deferred and referred to Planning Commission June 13, 1972

Passed Second Reading June 20, 1972

Referred to . . . . . .

Passed third Reading July 5, 1972

Approved July 11, 1972

By Beverly Bailey
Metropolitan Mayor

Departments Notified July 12, 1972

Advertised . . . . . .

EXHIBIT I

* * * * * * *

necting houses Nos. 316-318 with No. 323.

SEC. 2. That a detail drawing be required to be filed with the City Engineer setting forth the exact location, plans and specifications of said conduits.

SEC. 3. That this ordinance take effect from and after its passage, the welfare of the city requiring it.

Approved July 23, 1914. H. E. HOWSE, *Mayor*.

D

CONDUIT ACROSS CHURCH STREET

SECTION 1. *Be it enacted by the Board of Commissioners of the City of Nashville,* That franchise and permission be, and the same is hereby, granted to the Postal Telegraph-Cable Company to locate, construct and maintain underground conduits for wire and cable purposes as follows: From a point on the east line of the alley west of and parallel to Sixth Avenue fifteen feet south of Church Street northwardly across Church Street into the basement under the east sidewalk of Capitol Boulevard, said conduit abutting and connecting the Watkins Building with the building located on the northeast corner of Church Street and Capitol Boulevard; also, from a point on the east line of Printers' Alley ten feet south of Church Street northwardly across Church Street to a point on the east line of the same alley ten feet north of Church Street, said conduit abutting and connecting the Banner Building with the Noel Block.

SEC. 2. That detail drawings setting forth the exact location, plans and specifications of said conduits be required to be filed with the City Engineer.

SEC. 3. That this ordinance take effect from and after its passage, the welfare of the city requiring it.

Approved September 22, 1914. H. E. HOWSE, *Mayor.*

CHAPTER II

WESTERN UNION TELEGRAPH COMPANY

Section

1. Permission given to establish district messenger service.
2. Under supervision of Board.

3. Dead wires.
4. Wires already strung.
5. Regulations governing wires.
6. Rights reserved by city.
7. Ordinances may be repealed.
8. Ordinance to take effect from passage.

* * * * * * *

conditions hereinafter imposed, the Western Union Telegraph Company be, and is hereby, granted the privilege to string wires over and along the streets and alleys of the city of Nashville, for the purpose of establishing and maintaining a system of messenger district telegraph service.

SEC. 2. The wires so used shall be erected under the direct supervision and control of the Board of Public Works and Affairs, and shall be insulated, and of the kind and size to be approved by said Board, and said insulation shall at all times be maintained, be safe from giving off electricity; and said wires shall be of such height from the ground and placed so as not to interfere, in the judgment of the Board of Public Works and Affairs, with any other wires now erected. Said company shall first obtain the written consent of any other company using poles on the streets and alleys to use the same whenever accessible, when its own poles now erected cannot be used, or when there are no such poles, or the consent of the company cannot be obtained, then like consent of the owner of any buildings for the purpose of supporting said wires, it being the purpose of the Mayor and City Council not to grant permission for the placement of any more poles upon the streets and alleys of the city. Said wires shall be so fixed or adjusted on the poles, or, as the case may be, to the walls or roof of houses, as to satisfy the Board of Public Works and Affairs at all times of

the absolute safety of said wires against falling or becoming loose, and damaging life or property. The fixtures used by said company shall also be of such kind and material as shall be approved by the Board of Public Works and Affairs.

SEC. 3. It shall be the duty of said company, at all times, and before attempting to erect any wires under this grant, to first notify the Board of Public Works and Affairs, in writing, of the fact, stating the objective point or building to which it is desired to connect with, and the proposed route by street or alley, the object being to enable said Board to keep track of all such wires as may thus be used. Any wire erected under the authority herein given which shall cease to be used for a period of thirty days shall be deemed and known as a "dead wire," and it shall be the duty of said company forthwith to have the same taken down and removed from the streets or alleys.

SEC. 4. If said company shall, at the date of the passage and approval of this ordinance, already have erected one or more wires, it shall be its duty, and it is hereby required, to immediately furnish to the Board of Public Works and Affairs a list of the same. If it shall satisfactorily appear to said Board that the wire is of the proper kind and properly insulated, and strunk in compliance with Section 3 of this ordinance, said Board are authorized to accept the same, but otherwise said wire or wires shall be taken down, or so changed as to comply with the requirements of this ordinance.

SEC. 5. The rules and regulations heretofore adopted by the Board of Public Works and Affairs with reference to the telephone, electric light, etc., shall apply to this company so far as the same is applicable, and the same are hereby referred to and adopted, the same as if such rules and regulations were herein fully incorporated. In addition thereto, said Board is hereby authorized and empowered to adopt such other rules and regulations governing said company as may, in the judgment of

said Board, be required by the public welfare. Said company, before it shall begin operation under this ordinance, shall, by its proper officers, file with the Recorder an acceptance of the same, with all its terms and provisions, and shall enter into a bond of five thousand dollars to save the city against any damage that may be caused by said wires, which bond shall be renewed whenever the City Council may, by ordinance, require; and the same shall be filed with the recorder for transmission to and acceptance by the City Council.

SEC. 6. The right is hereby reserved to the Mayor and City Council to further regulate the operation of said wires should it so desire. Should the company fail or refuse to fully observe and comply with any of the provisions of this ordinance it shall be deemed to be guilty of a misdemeanor, and subject to a fine of twenty-five dollars for each violation.

SEC. 7. The Mayor and City Council here expressly reserve the right to repeal this ordinance, whenever, in their judgment, a repeal may be demanded by the public welfare, without liability of any kind to said company because of said repeal.

SEC. 8. That this ordinance shall take effect from and after its passage, the welfare of the city requiring it.

Passed April 16, 1891.

Acceptance

NASHVILLE, June 21, 1891.

The Western Union Telegraph Company hereby accepts the grant to said company by the Mayor and City Council of Nashville in an ordinance passed April 16, 1891, with all the provisions, restrictions, conditions and limitations contained therein.

WESTERN UNION TELEGRAPH COMPANY,
By JO. W. FISHER, *Office Manager*.

Bond

Supreme Court, U. S.
FILED
SEP 7 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 78-236

METROPOLITAN DEVELOPMENT AND HOUSING AGENCY,
Plaintiff-Appellant,

vs.

SOUTH CENTRAL BELL TELEPHONE COMPANY; METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, acting by and through the ELECTRIC POWER BOARD of said Government; NASHVILLE GAS COMPANY; COLONIAL PIPELINE COMPANY; and THE WESTERN UNION TELEGRAPH COMPANY,
Defendants-Appellees.

MOTION OF APPELLEES

South Central Bell Telephone Company, Nashville Gas Company, Colonial Pipeline Company and The Western Union Telegraph Company to Dismiss Appeal or Affirm Judgment of State Court

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 78-236

METROPOLITAN DEVELOPMENT AND HOUSING AGENCY,
Plaintiff-Appellant,

vs.

SOUTH CENTRAL BELL TELEPHONE COMPANY; METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, acting by and through the ELECTRIC POWER BOARD of said Government; NASHVILLE GAS COMPANY; COLONIAL PIPELINE COMPANY; and THE WESTERN UNION TELEGRAPH COMPANY,
Defendants-Appellees.

MOTION OF APPELLEES

South Central Bell Telephone Company, Nashville Gas Company, Colonial Pipeline Company and The Western Union Telegraph Company to Dismiss Appeal or Affirm Judgment of State Court

Come Appellees, South Central Bell Telephone Company, Nashville Gas Company, Colonial Pipeline Company and The Western Union Telegraph Company and pursuant to Rule 16 of this Court respectfully move the Court to dismiss the appeal, or in the alternative to affirm the judgment of the state court, upon the following grounds:

1. The appeal was not properly docketed in this court within the required time.

2. The federal question sought to be reviewed has been so plainly foreclosed by decisions of this court as to render the federal question unsubstantial and make further argument unnecessary.

STATEMENT OF THE CASE

References herein shown as (A-. . .) are to the Appendix attached to Appellant's Jurisdictional Statement. References to the Jurisdictional Statement will be designated as (JS . . .).

This is an action brought by the Metropolitan Development and Housing Agency for a declaratory judgment. The Agency contends that a Tennessee statute requiring said Agency to pay relocation costs for utility facilities located in public rights of way when displaced by urban renewal projects, is invalid under the contract clause of the U. S. Constitution. As concerns the utility companies (all of the Appellees except the Electric Power Board) the Agency contends that under franchise agreements between the City of Nashville and the respective utilities (to which agreements the Agency is not a party) the Agency has a right to have such relocation costs borne by the utilities and that said statute impairs that right.[1]

The state courts below held that the Appellant, being a subordinate state agency, cannot claim the constitutional protection of the contract clause against action by the state, its creator.

Certain statements in Appellant's "Statement of the Case" are inaccurate and should be challenged:

---

[1] Appellant also mentions contracts between it and the Department of Housing and Urban Development as being in some way impaired. But the Court of Appeals opinion notes that no contracts with H.U.D. appear in the record. (A-24).

1. Appellant refers to the Tennessee Court of Appeals assumption *"arguendo* that plaintiff is in the position of a party to all the contracts involved, that the franchise contracts do require relocation of defendants' facilities at defendants' cost, and that there has been some impairment of all the contracts involved." Appellant then says that the Tennessee Court of Appeals in its Opinion "affirmed for the purposes of its Opinion that the factual issues in dispute were resolved in favor of the plaintiff. . . ." (JS, page 4) It is plain that none of said so-called factual issues were "affirmed" or "resolved" in favor of the plaintiff. The trial court had found that the "plaintiff is not a party to any contract with these utilities, therefore the statute does not affect any agreements between the parties." (A-18; A-25) The Court of Appeals did not pass on that or the other issues mentioned by Appellant. On the contrary, the court stated that "We emphasize that we decide none of these points, and that there is serious doubt about many of them, but that we assume them in order to reach the dispositive issue in the case." (A-26)

2. Appellant states in a footnote that "Once a housing authority is created, it becomes an agency of the city and *not a state agency.*" (emphasis added) Appellant cites *Knoxville Housing Authority v. City of Knoxville,* 174 Tenn. 76, 123 S.W.2d 1085 (1939) in support of that statement. (JS 5) In the *Knoxville* case the Court said that property held by the housing authority "is a holding by the City of Knoxville" within the sense of a state constitutional provision excluding from taxation property held by the state, counties, cities or towns. Nowhere in the cited cases did the court say that the housing authority was "not a state agency".

3. Appellant states that in the franchise agreements the utilities agreed with the city that they "would relocate their utility lines and facilities at their own expense if said relocation became necessary or required by the city;" and Appellant further states that the franchise agreements "required the utility com-

panies to relocate their facilities at their own expense when requested to do so by the City of Nashville." (JS 6) These statements are not substantiated by anything in the opinion of the Court of Appeals. Although Tennessee follows the common law rule that uncompensated relocation can be required under the police power Appellees have insisted at all times that the language of the franchises, granted many years before the advent of urban renewal, is not so broad as to impose any *contract obligation* to relocate to accommodate urban renewal projects. (A-45; A-53-54; A-67; A-73-75).

In any event, the City of Nashville (now Metropolitan Government of Nashville and Davidson County) which granted the franchises has not requested relocation and, significantly, was never made, and did not seek to become, a party to this case.

ARGUMENT

The Appeal Was Not Properly Docketed in This Court Within the Required Time.

An appeal not only must be "taken" within 90 days (or properly extended period) after the entry of the state judgment but the appeal must also be "perfected". The perfection of the appeal is accomplished by docketing the case in this court as provided in Rule 13. U.S. Supreme Court Rule 10, Paragraph 1.

Rule 13 requires that "Not more than ninety days after the entry of the judgment appealed from it shall be the duty of the appellant to docket the case in the manner set forth in paragraph 2 of this rule. . . ." U. S. Supreme Court, Rule 13, Paragraph 1. Paragraph 2 of Rule 13 requires, among other things, the filing by Appellant of a jurisdictional statement "which shall comply in all respects with Rule 15. The case will then be placed on the docket".

Rule 15, with which the jurisdictional statement must comply, requires that a copy of the notice of appeal "shall be appended" as provided in subparagraph (j): and subparagraph (j) mandates that "There shall be appended to the statement a copy of the notice of appeal showing the date it was filed and the name of the court where it was filed."

No copy of the notice of appeal was appended to Appellant's jurisdictional statement in the present case. Although Appellees are advised that a notice of appeal was timely filed with the clerk of the Supreme Court of Tennessee, Appellees are further advised that no copy of that notice was ever filed in this court until on or after August 15, 1978, notwithstanding the fact that the time (as extended) for docketing the appeal expired August 10, 1978.

Therefore, the case has not been timely and properly docketed in this court as required by the rules.

The Federal Question Sought to Be Reviewed Has Been So Plainly Foreclosed by Decisions of This Court as to Render the Federal Question Unsubstantial and to Make Further Argument Unnecessary.

This court has held a number of times that an appealed decree or judgment of a state court will be affirmed on motion where the question urged as a basis for reversal has been so plainly foreclosed by prior decisions of this court as to make further argument unnecessary.

Missouri Pacific R. Co. v. Castle, 224 U.S. 541 (1911); *Chicago, R. I. & P. R. Co. v. Devine*, 239 U.S. 52 (1915); *City of Boston v. Jackson*, 260 U.S. 309 (1922); *Minneapolis, etc., R. Co. v. Merrick Co.*, 254 U.S. 376 (1920); *Utley v. St. Petersburg*, 292 U.S. 106 (1934), *rehearing denied*, 292 U.S. 604. Such an appeal presents no substantial federal question. *City of Trenton v. New Jersey*, 262 U.S. 182 (1923); *Zucht v. King*, 260 U.S. 174 (1922).

In Appellant's Statement of the Case it is conceded that Appellant is a subordinate governmental agency created pursuant to state statute. (JS 4) T.C.A. 13-904[2] expressly provides that it is "a public body corporate and politic." While it is in some respects an agency of the municipality it is no less a state agency than is the municipality itself. Under the law of Tennessee it performs a governmental function and is engaged in an exercise of the State's police power. *Bristol Housing Authority v. The Bristol Gas Corporation*, 219 Tenn. 194, 407 S.W.2d 681 (1966).[3] As a creature of the state its rights,

[2] Appended hereto.

[3] The Bristol case arose and was decided before the enactment of T.C.A. 13-828—833, the reimbursement statute involved in the present case. Therefore, pursuant to the common law rule which prevails in Tennessee in absence of statute, the Gas Company was required to relocate its facilities without compensation.

powers and duties, indeed its continued existence, can be changed or terminated by the state at any time.

For more than a hundred years the principle has been established and adhered to by decisions of this court that a governmental entity which is an arm or agency of the state cannot invoke the contract clause of the Constitution against legislative action of the state which created it. *City of Worcester v. Worcester Street Railway Company*, 196 U.S. 539 (1905); *New Orleans v. New Orleans Waterworks Co.*, 142 U.S. 79 (1891); *Tippecanoe County v. Lucas*, 93 U.S. 108 (1876); *Williams v. Baltimore*, 289 U.S. 36 (1933).

The authorities cited by Appellant do not depart from this established principle. On the contrary, they support it. Appellant's main reliance appears to be upon *United States Trust Company v. New Jersey*, 431 U.S. 1 (1977), but that reliance is misplaced. In that case New York and New Jersey, in 1962, had entered into a statutory covenant with each other *and with the holders of bonds issued by the New York Port Authority*, which covenant restricted the expenditure of revenues pledged as security for the bonds. Later in 1978 both states passed a statute repealing the 1962 statutory covenant. The United States Trust Company *as trustee for bond holders and also as a bond holder itself*, brought suit to declare the 1973 Act unconstitutional as impairing the obligations of the bond holders' contract. New Jersey's defense was that the 1973 Act was a reasonable and valid exercise of the police power and therefore immune from the reach of the contract clause of the Constitution. The Court struck down the 1973 statute, holding that it clearly impaired the obligation of the state to the bond holders and that such impairment, under the circumstances shown in that case, was not the result of a reasonable and valid exercise of the police power. The decision offers no support to Appellant in the present case because there the bond holders who had dealt with the state agency were objecting to

the impairment of an obligation owed *from* the state to them, whereas in the case at bar the state agency is objecting to the impairment by the state of an alleged obligation owed *to* the state or one of its governmental subdivisions.

Appellant, throughout this litigation, has refused to recognize that there is a very real and valid distinction between a case in which the state, by statute, releases or "impairs" an obligation *due to* the state or state agency (which is the alleged case at bar), and a case in which the state, by statute, impairs an obligation *due from* the state or state agency to private parties (which is *United States Trust Company v. New Jersey*).

Furthermore, even as affects the non-public party to a contract, contract rights like property rights are not immune from modification resulting from a valid exercise of the State's police power. *Chicago, etc., Railroad Company v. Nebraska,* 170 U.S. 57 (1898); *Northern Pacific Railway Company v. Minnesota,* 208 U.S. 583 (1908); *Home Building & Loan Assn. v. Blaisdell,* 290 U.S. 398 (1934). T.C.A. 13-828-831 is an enactment in the proper exercise of the State's police power and the legislative findings and declarations so show (A-1), (A-31) *Cf Pack v. Southern Bell Tel. & Tel. Co.,* 215 Tenn. 503; 387 S.W.2d 789 (1965) (statute providing reimbursement of utility relocation expenses occasioned by interstate highway system upheld as valid exercise of police power).

CONCLUSION

Since the present case involves only an attempt by a state subordinate agency to invoke the contract clause of the Constitution against action by the state legislature, the federal question has been so plainly foreclosed by repeated decisions of this court as to render it unsubstantial and make further argument unnecessary. The appeal should be dismissed or the judgment of the State Court affirmed.

Respectfully submitted,

J. O. BASS

T. G. PAPPAS
BASS, BERRY & SIMS
2700 First American Center
Nashville, Tennessee 37238
Attorneys for Appellees
(Except Electric Power Board)

APPENDIX

APPENDIX

13-904. Authority a public body corporate.—When the application has been made, filed and recorded, as herein provided, the authority shall constitute a public body corporate and politic under the name proposed in the application; the secretary of state shall make and issue to the said commissioners, a certificate of incorporation pursuant to the Housing Authorities Law, under the seal of the state, and shall record the same with the application. [Acts 1935 (E. S.), ch. 20, § 4; C. Supp. 1950, § 3647.3 (Williams, § 3647.4).]

Supreme Court, U. S.
FILED
SEP 7 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 78-236

METROPOLITAN DEVELOPMENT AND HOUSING AGENCY,
Plaintiff-Appellant,

v.

SOUTH CENTRAL BELL TELEPHONE COMPANY; METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, acting by and through the ELECTRIC POWER BOARD of said Government; NASHVILLE GAS COMPANY; COLONIAL PIPELINE COMPANY; and THE WESTERN UNION TELEGRAPH COMPANY,
Defendants-Appellees.

On Appeal from the Supreme Court of the State of Tennessee
at Nashville
Davidson Equity

MOTION TO DISMISS OR AFFIRM

On Behalf of Appellee, Metropolitan Government of Nashville and Davidson County, Acting by and Through the Electric Power Board of Said Government

HARRY MITTWEDE
1214 Church Street
Nashville, Tennessee 37246
Attorney for
Metropolitan Government, Etc.

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

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Williams v. Mayor and City Council of Baltimore, 289 U. S. 36, 53 S Ct. 431, 77 L. Ed. 1015 7

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Miscellaneous Cited

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28 U.S.C.A. 1257(2)—Appeal from final judgment of State Court 2, 10

IN THE

SUPREME COURT OF THE UNITED STATES

No. 78-236

METROPOLITAN DEVELOPMENT AND HOUSING AGENCY,
Plaintiff-Appellant,

v.

SOUTH CENTRAL BELL TELEPHONE COMPANY; METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, acting by and through the ELECTRIC POWER BOARD of said Government; NASHVILLE GAS COMPANY; COLONIAL PIPELINE COMPANY; and THE WESTERN UNION TELEGRAPH COMPANY,
Defendants-Appellees.

On Appeal from the Supreme Court of the State of Tennessee
at Nashville
Davidson Equity

MOTION TO DISMISS OR AFFIRM

On Behalf of Appellee, Metropolitan Government of Nashville and Davidson County, Acting by and Through the Electric Power Board of Said Government

The Appellee, Metropolitan Government of Nashville and Davidson County, Tennessee, acting by and through the Electric Power Board of said Government, pursuant to Rule 16, respectfully moves this Honorable Court to dismiss the above entitled

appeal or in the alternative to affirm the judgment of the Supreme Court of Tennessee, on the following grounds:

1. The judgment appealed from rests on an adequate non-federal question. The only question raised on appeal in the Tennessee Supreme Court and Court of Appeals by Appellant as to this Appellee was estoppel which is not involved in the constitutional issues raised in this appeal.

2. The appeal does not present a substantial federal question.

3. Appellant has no right to appeal under 28 U.S.C.A. 1257(2).

STATEMENT

All other appellees operate under franchise from the Metropolitan Government of Nashville and Davidson County. This Appellee alone does not operate under a franchise. It operates as an independent agency of the Metropolitan Government under the name Nashville Electric Service and is referred to by that name, as the Electric Power Board or NES. (J.S., p. 6) Appellant's suit in Chancery sought the judgment of the Chancellor that the obligations of these franchise agreements between the City and the utility companies were impaired by T.C.A. §13-828, et seq. It also sought a judgment that the obligations of contracts between Appellant and the United States Government (HUD) and between Appellant and the Metropolitan Government were impaired by said statute. (J.S., pp. 6, 7) The original complaint, as amended, sought relief against Appellee (NES) on the basis of estoppel. (A. 11) The Chancellor found that Appellee (NES) was not estopped and sustained its counterclaim or cross-complaint. (A. 15, 16) Prior to enactment of T.C.A. 13-828-831, all Appellees had to bear the burden of relocation expenses. (A. 17) Appellee (NES) was not required

to pay these expenses because of any franchise or other contractual obligation (as alleged against all other Appellees) but as a requirement under the common law. (A. 21) *Pack v. Southern Bell*, 215 Tenn. 503. 387 S.W.2d 789, 1965.

Appellant's Assignments of Error in the Court of Appeals were based on: ". . . the Chancellor's holding that the statute is constitutional as applied to it, his finding that plaintiff (Appellant) is not a party to the franchise agreements between Metro and defendants, and his conclusion that NES is not estopped to rely on T.C.A. § 13-828—13-831." (A. 25) The Court of Appeals also found no basis on which to hold this Appellee, Electric Power Board (NES) is estopped from claiming the benefits of the statute in question. (A. 32) After deciding that this Appellee was not estopped to claim the benefit of being reimbursed its relocation cost under the statute, the Court of Appeals stated:

> "In addition, we note that it would indeed be odd if NES were held estopped to accept the benefits of a statute because its truthful representations were relied on by plaintiff in entering into contracts, when we have already held that any impairment of the contracts themselves by that statute is entirely valid and constitutional as far as plaintiff is concerned."

The questions presented for review by Appellant raise the constitutional questions:

1. Does Appellant, as a governmental agency, political subdivision of the State, have protection of the Constitution against impairment of obligations of its contracts.

2. Did the State by enactment of T.C.A. 13-828, et seq., unconstitutionally impair any contracts. (J.S.. p. 3)

No question is raised challenging the Tennessee Court's decision holding that this Appellee is not estopped to recover its relocation cost under the statutes.

The Court of Appeals opinion on the constitutional questions applied only to the franchise agreements held by all other Appellees and not to this Appellee. The assumptions made "arguendo" by the Court are set out in Appellant's Statement of the Case. (J.S., p. 4) These assumptions apply only to the contractual relationship created by the franchise agreements and not to any alleged contractual relationship between Appellant and this Appellee. (A. 25) The Court of Appeals dispensed with Appellant's appeal against this Appellee in its decision rejecting Appellant's contention that NES, either due to its own actions or those of Metro, is estopped to claim reimbursement of its relocation expenses under the statute. (A. 24)

The dispositive factor, upon which the Court of Appeals rested its decision, was that Appellant, an agency of the State, had no protection under the Contract Clause of both the State and Federal Constitutions. It only assumed for argument that Appellant was a party to all contracts involved, that the franchise agreements required the defendants (all Appellees here except Appellee (NES) to relocate their facilities at defendant's cost and that there has been some impairment of all contracts involved. The State Court made no finding on these questions because its disposition of the case did not require it. It did not find a State statute valid as against the charge of unconstitutional impairment. (A. 26) It results that both constitutional questions raised by this appeal can be answered in favor of Appellant and still appellant could not recover from this Appellee (NES).

In addition to the franchises of Appellees except Appellee (NES), Appellant had contract with HUD and Metropolitan Government. (J.S. pp. 6, 7) There is no allegation that Appellee (NES) was a party to either. Appellant sought by estoppel to deny this Appellee the right to recover its relocation costs under the statute. This contention has been rejected by the State courts and is foreclosed. It is not before this Court and therefore, Appellant has failed to establish jurisdiction since this Appellee

has no obligation under any contracts which could possibly have been impaired by the Tennessee statute. Appellant fails to establish the jurisdiction of this Honorable Court over this Appellee involving the constitutional questions proposed in the Jurisdictional Statement. The appeal is without substance. raises no substantial federal questions and is frivolous as to this Appellee.

ARGUMENT

FIRST GROUND: The judgment rests on adequate non-federal question.

1. As to this Appellee, the appeal is frivolous. It is apparent that the only basis of relief against this Appellee, which has no franchise, is estoppel. No federal question can be raised unless the threshold issue of estoppel is decided against this Appellee. Unless this Appellee is determined to be estopped to rely on the provisions of the Tennessee statute there is no kind of agreement existing between these two parties the obligations of which could possibly be impaired. Without that relationship, which Appellant sought to establish, but failed to establish, by estoppel in the State courts, there cannot be an impairment and consequently, the Contract Clause of the Federal Constitution cannot be violated by the State statute. Before the enactment of the State statute, Appellee (NES) was required to relocate its facilities at its own expense under common law, *Pack* supra, 215 Tenn. 503, 387 S.W.2d 789, 1965, and not because of obligations of a franchise or contract. The judgment appealed from, as to this Appellee, rests on the State Court's decision on estoppel in its favor. This determination is both adequate and non-federal.

SECOND GROUND: No substantial federal question is raised.

In light of the prior decisions of this Honorable Court, there is no substantiality and this appeal should be dismissed without opportunity for oral argument.

(Wright, Miller, Cooper, Gressman, Federal Practice and Procedure: Jurisdiction §4003, N. 4)

> "The test of quality required before a federal question could support jurisdiction was that

> although, in considering a motion to dismiss, it be found that a question adequate abstractly considered to confer jurisdiction was raised, if it likewise appear that such question is wholly formal, is so absolutely devoid of merit as to be frivolous, or has been so explicitly foreclosed by a decision or decisions of this court as to leave no room for real controversy, the motion to dismiss will prevail."

Id., §4014 at 635, cited *Equitable Life Assurance Society v. Brown*, 1902, 23 S. Ct. 123, 187 U.S. 308, 47 L. Ed. 190.

The rule of this Honorable Court is expressed by former Chief Justice Warren at note four (4) under heading "Full Argument", in the Jurisdictional sections of the Wright, Miller, Cooper, Gressman work:

> "As regards appeals from state courts our jurisdiction is limited to those cases which present substantial federal questions. In the absence of what we considered substantiality in the light of prior decisions, the appeal will be dismissed without opportunity for oral argument." Id. § 4003 at 501.

No case cited by Appellant supports its position that, as an agency of the State, it has protection against impairment of obligations of contracts under the Contract Clause. The prior decisions of the Court, without exception, support the following proposition:

> A municipal corporation, created by a state for better ordering of government has no privileges or immunities under Federal Constitution which it may invoke in opposition to the will of its creator.
>
> *Williams v. Mayor and City Council of Baltimore*, 289 U. S. 36, 40, 53 S. Ct. 431, 77 L. Ed. 1015.

Mr. Justice Cordoza delivered the opinion of the Court and cited the following authorities:

> *Trenton v. New Jersey*, 262 U. S. 182, 67 L. Ed. 937, 43 S. Ct. 534, 29 ALR 1471; *Newark v. New Jersey*, 262 U. S. 192, 67 L. Ed. 943, 43 S. Ct. 539; *Worcester v. Worcester Consol. Street R. Co.*, 196 U. S. 539, 49 L. Ed. 591, 25 S. Ct. 327; *Pawhuska v. Pawhuska Oil & Gas Co.*, 250 U. S. 394, 63 L. Ed. 1054, 39 S. Ct. 526, P.U.R. 1919E, 179; *Risty v. Chicago R. I. & P. R. Co.*, 270 U. S. 378, 390, 70 L. Ed. 641, 651, 46 S. Ct. 236; *Railroad Commission v. Los Angeles R. Corp.*, 280 U. S. 145, 156, 74 L. Ed. 234, 239, 50 S. Ct. 71. Id. at 40, 41.

Appellant cites the United States Trust Co. case as supporting its Argument No. 1 that as a local governmental agency, it is protected against legislative impairment of the obligations of its contracts. *United States Trust Co. v. New Jersey*, 431 U.S. 1, 97 S. Ct. 1505, 52 L. Ed. 2d 92 (1977). The critical difference between United States Trust Co. fact and the facts in this case, is that the plaintiff appellant in United States Trust Co. is not a local governmental agency but a trustee and holder of Port Authority bonds who challenged the constitutionality of legislation which impaired the obligations owed by the Port Authority to the bondholders.

The State Court in the case sub judice held that the dispositive factor is that Appellant, as an agency of the State of Tennessee, cannot claim the constitutional protection of the Contract Clause against the alleged impairment of these contracts by the State. The Court cited as authority *City of Worcester v. Worcester Consolidated Street Railroad Co.*, just as Mr. Justice Cordoza did in *Williams v. Baltimore*, Id.

The State Court correctly held that appellant has no protection under the Contract Clause and properly reviewed the authorities including prior decisions of this Honorable Court. (A. 25-30)

Appellant argues the "less drastic means" test and refers to United States Trust Co., supra, id. at 29-31, 97 S. Ct. at 1522, 52 L. Ed. at 114-15, and seeks to have this Court influenced by a quotation from that case, "(A) State is not free to impose a drastic impairment when an evident and more moderate course would serve its purposes equally well."

This Appellee submits that the question of the impact of the statute involved is not before this Court even assuming for argument, that Appellant has protection under the Contract Clause. There will be no financial impact on Appellant because none of its own funds are involved. It obtains two-thirds of its funds from the Federal Government (HUD) and one-third from the Metropolitan Government. (A. 20) Neither the Federal or Metropolitan Governments are parties to this action. In this connection, Appellee (NES) does point out that the Tennessee Legislature in its FINDINGS AND DECLARATIONS, made a strong statement supporting its action as being in the public interest under the police power. This is contained in T.C.A. 13-828. (A. 1)

Appellant argues that the burden placed on Federal and State taxpayers is unreasonable and that it is not demonstrated that the impairment was essential to achieve an important state purpose. (J.S. p. 16) The above referred to sections of the Tennessee Code refute this argument. Further, Appellee (NES) insists that Appellant has alleged no right to have the constitutional rights of taxpayers adjudicated in this cause. Neither has it alleged any authority to have rights of the Federal Government (HUD) and the Metropolitan Government adjudicated. Appellant has no standing to bring such constitutional questions before this Honorable Court. This appeal is frivolous on this ground and should be dismissed. *Fileson v. Ullman*, 1943, 63 S.Ct. 493, 318 U.S. 44, 87 L. Ed. 603.

THIRD GROUND: No right to appeal under 28 U.S.C.A. 1257 (2).

The Tennessee Court did not decide the issue of whether the State Legislature unconstitutionally impaired existing contractual obligations but based its decision upon the preliminary issue that the Contract Clause does not protect Appellant, a local governmental agency. (A.31) This is admitted by Appellant (J.S.p.3) yet it seeks to appeal under 28 U.S.C.A. 1257 (2) which authorizes appeal only from final judgments of State Courts which have found in favor of the validity of a state statute which has been challenged as repugnant to the Constitution, treaties or laws of the United States.

The Tennessee decision does not fit into the mold of that law.

The rule in this situation is:

> "It is plain that appeal may not be had on the ground that a state statute could have furnished a basis for, if the state courts have in fact rested decision solely on other grounds." Wright, Miller, Cooper, Gressman, Jurisdiction § 4012 at 609. This textbook cited *May v. Anderson*, 1953, 73 S. Ct. 840, 841 & n. 2, 345 U. S. 528, 530, & n. 2, 97 L. Ed. 1221. Also see *Zucht v. King*, 1922, 43 S. Ct. 24, 25, 260 U. S. 174, 177, 67 L. Ed. 194, cited *Wright, Miller*, etc. Id. at 616.

Other arguments made by Appellant are not considered pertinent to the issues now before this Honorable Court. Appellant clearly has no right to appeal under the Federal Code cited because the federal question sought to be reviewed was not expressly passed on by the Tennessee Supreme Court.

CONCLUSION

1. Under the Third Ground of this Appellee's Motion to Dismiss, it is obvious that Appellant has no right to appeal from the decision by the State Court.

2. Under the First Ground of Appellee's Motion to Dismiss, it is apparent from Appellant's Jurisdictional Statement and the Appendix thereto, that this Appellee is not in any contractual relationship with Appellant. Appellant attempted to get this Appellee into some such relationship through the application of the Tennessee law of estoppel. Both the Chancellor and the Court of Appeals found no basis for application of this law against this Appellee. This appeal is so lacking in substance as to be frivolous.

3. Even assuming this Appellee wrong in its position expressed in the preceding grounds, there is no substantial federal question in view of the prior decisions of this Honorable Court. Appellant's claim that it has protection under the Contract Clause is frivolous.

WHEREFORE, Appellee respectfully submits that the questions upon which this cause depend are so unsubstantial as not to need further argument and Appellee moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in this cause by the Supreme Court of Tennessee.

Respectfully submitted,

HARRY MITTWEDE
Attorney for Appellee
Metropolitan Government of Nashville and Davidson County, Acting by and Through the Electric Power Board of Said Government (Nashville Electric Service)

Certificate

I hereby certify that copy of the foregoing has been deposited in a United States Post Office of mail box, with first class postage prepaid, to Honorable Joseph L. Lackey, Jr., 421 Charlotte Avenue, Nashville, Tennessee 37219, Attorney for the Appellant, and to Honorable J. O. Bass, First American Center, Nashville, Tennessee 37238, Attorney for all Appellees except Metropolitan Government of Nashville and Davidson County, Tennessee, acting by and through the Electric Power Board.

Harry Mittwede
Attorney for Metropolitan Government of Nashville and Davidson County, acting by and through the Electric Power Board of said Government